85-1626

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, and UNITED POLITICAL ACTION COMMITTEE OF CHESTER COUNTY, DAVID DANTZLER, JR., JOHN R. HICKS, III, DOCK L. MEEKS, individually and on behalf of all others similarly situated,

Petitioners,

v.

LUKENS STEEL COMPANY, INTERNATIONAL STEELWORKERS OF AMERICA, (AFL-CIO), LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO) and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX

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FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1478 & 84-1509

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., AND LYMAS L. WINFIELD, on their own behalf and on behalf of others similarly situated.

and

UNITED POLITICAL ACTION COMMITTEE, an unincorporated association, DOCK MEEKS, DAVID DANTZLER, JOHN HICKS, III, individually and on behalf of all others similarly situated

v.

LUKENS STEEL COMPANY, and INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO)

United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295, Appellants in 84-1478

Lukens Steel Company, Appellant in 84-1509

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 73-1328)

Argued June 11. 1985

Before: WEIS. GARTH. and STAPLETON.
Circuit Judges

Filed November 13. 1985

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OPINION OF THE COURT

WEIS. *Circuit Judge.*

This appeal is from the grant of injunctive relief and liability findings in a wide-ranging employment discrimination class action. We conclude that : (1) the same period of limitations applies in § 1981 claims as in those under § 1983: (2) class representatives who were not discriminated against in initial work assignments may not represent those who were: (3) on remand. consideration should be given to appointment of an appropriate representative and possible reinstatement of findings: (4) the unions violated Title VII and § 1981 by failing to assert racial bias as grievances: (5) the limitations period for a Title VII charge against a union begins only after it is named in an EEOC proceeding and not on the date that a charge is brought against the employer alone in a state proceeding: (6) a finding of discrimination in denying incentive pay was clearly erroneous where the evidence demonstrates the action was taken solely on economic grounds: and (7) other findings of discrimination by the district court were not clearly erroneous. Accordingly. we affirm. reverse. and remand in part.

After a lengthy bench trial. the district judge found for plaintiffs on several counts alleging discrimination in employment. and therefore entered a remedial order. reserving assessment of damages for future proceedings. On the other counts. the court concluded that the evidence was inadequate to support the plaintiffs' claims and entered judgment for defendants. Defendants appeal the orders adverse to them.[1]

In 1973. class action plaintiffs filed this massive suit on behalf of current and past employees of the Lukens Steel Company. alleging violations of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq.* Plaintiffs sought both injunctive relief and damages.

Defendant Lukens is an independent steel producing company with its principal facility in Coatesville. Pennsylvania. Since 1966. its work force has ranged between approximately 4200 and 5300 employees: of these the hourly employees numbered between 2600 and 3900. From 1967 to 1978. the percentage of black employees in the hourly work force varied between 21.8 and 24.1. Lukens' hourly employees had been represented by Locals 1165 and 2295 of the United Steelworkers of America. and the unions are listed as defendants together with the company.

The district court observed that work at Lukens requires skills which are unique to its specialized products. With a few limited exceptions. the "majority of the Lukens hourly work force start from scratch. and are trained on the job." Partially as a consequence of the need for highly specific skills. the company has a general policy of promoting from within its workforce. The district court found that to some extent current

1. The district court opinion is reported at Goodman v. Lukens Steel Co.. 580 F. Supp. 1114 (E.D. Pa. 1984)

disparaties between white and black employees are a reflection of historical discrimination existing well before the statutory limitations period applicable in this lawsuit.

Plaintiffs developed their case by a combination of statistical and anecdotal evidence. After the compilation of an extensive record. the court found evidence of discriminatory practices by the company in the following categories:

1. Initial job assignments to higher paying craft jobs were skewed in favor of whites. Blacks also were assigned in higher percentages than whites to "pool" positions. which had seniority provisions inferior to those in the "subdivisions."

2. Evidence focusing on transfers to more desirable craft positions demonstrated that whites were favored over blacks by a substantial margin.

3. Incentive pay was denied to workers in the predominantly black crews in the Pit Subdivision. although it was given to other specialized crews composed mainly of whites.

4. Lukens discriminated against black workers by discharging a higher percentage of black employees during their probationary period.

5. The company discriminated against blacks in denying them promotion to salaried positions in management.

6. Lukens tolerated harassment of black employees by whites and failed to take appropriate steps to curb such behavior. thereby encouraging workers to believe such conduct would go unpunished.

The district court also determined that the unions were guilty of discriminatory practices in:

1. Failing to challenge discriminatory discharges of probationary employees.
2. Failing and refusing to assert instances of racial discrimination as grievances.
3. Tolerating and tacitly encouraging racial harassment.

The court further found that plaintiffs had failed to present adequate proof of discrimination in the following areas:

1. The seniority system.
2. Manning of the new Strand-cast facility (with the exception of class representative Ramon L. Middleton).
3. Shift assignments, including Sundays and holiday work, as well as overtime pay.
4. Discipline (excluding discrimination in discharge of probationary employees).
5. Awards for employee suggestions for improvement in plant operation.
6. Processing grievances by the unions insofar as the complaints centered on the number of grievances which the locals presented initially and pursued through arbitration. In addition, the lower rate of successful outcomes for black employees' grievances did not show racial discrimination.

The court also directed individual relief for class representatives Goodman, Winfield, Jones, Middleton, and Dantzler, but denied the individual claims of Dock L. Meeks, and John R. Hicks III.

The court issued orders against the company and the unions enjoining racial discrimination in the specific areas in which violations of Title VII and § 1981 had been found and directing certain remedial measures. Notice to class members was ordered, and a tentative trial date was set for the individual claims.

Both the company and the unions have appealed the various findings against them, challenging both legal and factual determinations made by the district court. Plaintiffs have not appealed the rulings on which they or the class were unsuccessful.

I.

THE STATUTE OF LIMITATIONS FOR SECTION 1981 CLAIMS

Because there is no specified federal statute of limitations applicable to § 1981 cases, the district court was required to use the state limitations period most analogous to the civil rights cause of action. *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). In a Memorandum Opinion issued on June 16, 1975, the district court concluded that the appropriate period was the six years set forth in Pa. Stat. Ann. tit. 12, § 31, rather than the two year period "for injury wrongfully done to the person" as set out in Pa. Stat. Ann. tit. 12, § 34.

In this determination, the district judge anticipated our decision some two years later in *Meyers v. Pennypack Woods Home Ownership Ass'n.*, 559 F.2d 894 (3d Cir. 1977), where we applied the six year general statute of limitations in a housing discrimination case brought under sections 1981 and 1982. *See also Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978) (six year statute of limitations applicable to § 1981 employment discrimination claim).

Although the district judge was correct in forecasting that we would adopt a six year limitation period in an employment case, his prescience, like ours, was limited. Neither he, nor this court, foresaw the Supreme Court's ruling that all § 1983 cases should be governed by a uniform statute of limitations -- that provided by the states for personal injury. *Wilson v. Garcia*, 53 U.S.L.W. 4481 (Apr. 17, 1985). That ruling requires us to reexamine our earlier decisions on the appropriate statute of limitations in Civil Rights cases.

In *Polite v. Diehl*, 507 F.2d 119 (3d Cir. 1974) (*in banc*), we discarded the notion of applying a single limitations period to all § 1983 cases and chose instead to look to the relief sought and the particular injury alleged. A claim alleging bodily injury was governed by the two year Pennsylvania statute but one which was more akin to a contract action came under the six year limitation. Hence, under *Polite v. Diehl* differing statutes of limitations would be applied to a variety of claims in one suit.

Although the court discussed only the § 1983 claims, it noted that plaintiff did formulate causes of action under § 1981. 507 F.2d at 121, n.2. In any event, the *Polite* rationale of looking to the facts in each case and then searching out for the most analogous state statute was followed in § 1981 cases, as well as those brought under § 1983. *See Davis v. United States Steel*, 581 F.2d at 338, 341 n.8; *Meyers v. Pennypack Words Home Ownership Ass'n.*, 559 F.2d at 903 n.27.

We later determined that the six year statute of limitations applied in § 1983 claims of (1) sex discrimination in employment, *Knoll v. Springfield Township School Dist.*, 699 F.2d 137 (3d Cir. 1983), *vacated and remanded* 53 U.S.L.W. 4488 (Apr. 17, 1985), *on remand* 763 F.2d 584 (3d Cir. 1985); (2)

termination of employment without due process, *Perri v. Aytch*, 724 F.2d 362 (3d Cir. 1983); (3) discharge from employment in violation of the First Amendment, *Fitzgerald v. Larson*, 741 F.2d 32 (3d Cir. 1984); and (4) termination of employment contract for exercise of First Amendment rights, *Skehan v. Trustees of Bloomsburg State College*, 590 F.2d 470 (3d Cir. 1978).

Wilson v. Garcia completely undermined the rationale we employed in *Polite* as we were quick to recognize. *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985), reviewed our earlier decisions in light of *Wilson* and applied Pennsylvania's two year statute of limitations for personal injuries to a § 1983 claim of employment termination without due process. In view of the previous unsettled law in this and other circuits, in *Smith* we also determined that *Wilson v. Garcia* should be applied retroactively.

Had the case at hand been brought under § 1983 rather than § 1981, the statute of limitations question would be answered by *Wilson*. This case, however, involves discrimination in private employment to which § 1983 does not apply, and therefore the issue is whether the same statute of limitations used under § 1983 should also apply to § 1981.

The *Wilson v. Garcia* analysis begins with a reference to 42 U.S.C. § 1988, which determines the "rules of decision applicable to Civil Rights claims." Because no federal statute of limitations has been provided for such claims, § 1988 approves the use of state law to provide the appropriate rule. The reference to state law, however, occurs only after analysis of the claim using federal standards. In characterizing § 1983 claims for statute of limitations purposes, the court must consider the elements of the cause of action and Congress' purpose in providing it. *Wilson*, 53 U.S.L.W. at 4483.

In deciding the issue presented here, we find it most significant that § 1988 applies not only to § 1983 but to § 1981 and the other reconstruction Civil Rights Acts as well. Section 1988 by its terms applies to "the jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'Civil Rights,' and of Title 'Crimes,' for the protection of all persons in the United States in their civil rights."

In this context, we do not consider relevant that § 1981 was originally enacted in 1866, reenacted in 1870, and later included in the 1874 codification, while § 1983 was the subject of separate legislation in 1871. *See Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1976); *Mahone v. Waddle*, 564 F.2d 1018, 1030-31 (3d Cir. 1977). Both sections are to be analyzed under the broad provision of § 1988, which is "a directive to select, in each state, the one most appropriate statute of limitations." *Wilson*, 53 U.S.L.W. at 4485. In this choice, we should be guided by "federal interests in uniformity, certainty, and the minimization of unnecessary litigation" over the limitations period as well as by the nature of the federal Civil Rights remedy, and the prevention of potential state discrimination against it.

In concluding that state statutes for personal injury were the most appropriate for use in § 1983 cases, the Supreme Court believed that the enacting Congress viewed civil rights actions as analogous to state tort claims. In this connection, one might argue, as does the dissent, that since § 1981 on "its face relates primarily to racial discrimination in the making and enforcement of contracts," *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975), the state statute of limitations applying to suits for breach of contract is the most appropriate one. *See Wilson v. Sharon Steel Corp.*, 549 F.2d 276, 280 (3d Cir. 1977).

We are not persuaded by that argument because it does not recognize the broad sweep of § 1981, *see Mahone v. Waddle*, nor is it consistent with the fundamental reasons underlying *Wilson v. Garcia*. There, the Court emphasized § 1983's derivation from the Fourteenth Amendment, which recognizes the "equal status of every person;" that all persons shall be accorded the full privileges of citizenship; and that no person should be deprived of life, liberty or property "without due process." *Wilson*, 53 U.S.L.W. at 4485. As the Court said, "[a] violation of that command is an injury to the individual rights of the person." *Id.*

Those concepts apply equally to actions under § 1981. Present day § 1981's predecessor was founded on the Thirteenth Amendment that allows "neither slavery nor involuntary servitude" to exist any longer. It is difficult to imagine a more fundamental injury to the individual rights of the person than the evil that comes within the scope of that amendment. Also of significance is that in *Runyon v. McCrary*, the Supreme Court accepted the use of a state's personal injury statute of limitations in a § 1981 case. 427 U.S. at 180-82.

Moreover, in its reenactment of § 1981 in 1870, Congress looked to constitutional authority embodied in the Fourteenth, as well as in the Thirteenth Amendment. *Croker v. Boeing Company*, 662 F.2d 975, 987 (3d Cir. 1981) (*in banc*); *see also General Building Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375 (1982). Consequently, much of the body of law developed under the Fourteenth Amendment is helpful in the interpretation of § 1981.

A substantial overlap exists in the types of claims brought under sections 1981 and 1983. A plaintiff may press an allegation of intentional racial discrimination under either section when state action is present. A § 1983 case of intentional racial discrimination in

employment filed in Pennsylvania against a state agency is governed by the two year personal injury statute. *See Knoll v. Springfield Township School Dist.*, 763 F.2d 584 (3d Cir. 1985). Application of Pennsylvania's six year statute of limitations where the same claim is brought under § 1981 would lead to a bizarre result.

Our first opinion in *Knoll*, 699 F.2d 137, 144, expressed our doubt that Congress would have intended a differing limitations period depending on whether the defendant was a state official sued under § 1983 or a private individual in a § 1981 action. The same conclusion is appropriate where the identical claim may be brought under either of these Reconstruction Civil Rights Acts. *See Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984). Therefore, because employment discrimination cases under § 1983, regardless of their affinity to contractual actions, are now governed by the personal injury statute of limitations, and because the same considerations which led to that judgment are also present in § 1981 cases, we conclude that the same limitations period applies.[2]

In taking this position, we are in agreement with Supreme Court in *Wilson* that the personal injury limitation period is unlikely to be fixed in such a way as to discriminate against federal Civil Rights claims. In addition, the factors characterized as "practical considerations" by Justice O'Connor's dissent in *Wilson* -- which include the desirability of uniformity, certainty, and minimization of litigation prior to reaching the merits -- are best served by applying the

2. We note that in 1978 and 1982 Pennsylvania's statute of limitations scheme was substantially revised. Claims for injury to economic rights, as well as for personal injuries, are currently subject to a two year limitation. 42 Pa. Cons. Stat. Ann. § 5524.

same statute of limitations to all of the Reconstruction Civil Rights cases.[3]

As we noted earlier, the reasoning employed by the Supreme Court in *Wilson* is inconsistent with the *Polite* approach as used in *Davis* and *Pennypack Words*. This court has consistently held that one panel may not overrule an earlier panel's decision. *See* Third Circuit Internal Operating Procedure VIII C. However, we have recognized that this principle must yield when a panel opinion is in conflict with an intervening Supreme Court precedent. "Where, however, a holding of this Court is overruled or rejected by the Supreme Court, IOP 8c does not require in banc consideration to align this court's jurisprudence with Supreme Court teaching. *Rubin v. Buckman*, 727 F.2d 71 (3d Cir. 1984) (Garth, J. concurring). *See also West v. Keve*, 721 F.2d 91, 93 (3d Cir. 1983); *Geraghty v. United States Parole Commission*, 719 F.2d 1199, 1209 (3d Cir. 1983). The rationale used in *Davis* cannot coexist with *Wilson*, and accordingly does not bind us here.

We hold, therefore, that the personal injury statute of limitations of the forum state supplies the most analogous statute of limitations for actions brought under § 1981. For the reasons set forth in *Smith v. City of Pittsburgh*, we also conclude that our decision should be given the customary retroactive effect. *See Fitzgerald v. Larson*, 769 F.2d 160 (3d Cir. 1985).

3. The plaintiffs argue that under the rule we adopt in this opinion a statute meant to cover only cases involving bodily injury will be applied to actions in which no such injury is alleged. *See* Meyers v. Pennypack Woods, 559 F.2d at 902. The Supreme Court clearly foresaw the possibility that uniform characterization of all civil rights claims might lead to some seemingly anomalous results under a particular state statutory scheme. *See* Wilson v. Garcia, 53 U.S.L.W. at 4484. That state law interpretations are not fully consistent is an acceptable result when considered in light of the overriding federal interest in uniformity.

Our holding affects some but not all of the findings made by the district court. Plaintiffs contend that the two year statute of limitations would not change the district court's decree because it was based on violations of Title VII as well as § 1981.[4] However, because the court did not consider the facts separately under § 1981 and Title VII, we conclude this lack of discrete analysis requires a partial remand.

As noted in *Croker v. Boeing*, 662 F.2d 975 (3d Cir. 1981), § 1981 liability is not co-extensive with that under Title VII, and the remedies provided under the two statutes are "separate, distinct, and independent." *See Johnson v. Railway Express Agency*. In the absence of a specific finding fixing liability under each statute, we are unable to say whether application of the two year statute of limitations would result in a difference in the court's decree on two of its liability determinations. It is conceivable, for example, that events within the six year statute of limitations used for the § 1981 claims might have been considered by the court in finding liability under Title VII beyond its limitations period.

In finding discrimination in transfers to salaried positions, the district court relied heavily on the low percentage of blacks promoted to foreman jobs in the years 1969 and 1970 -- between three and four years before the suit was filed. The court found that the evidence "overwhelmingly establishes that Lukens discriminated in the selection of foremen until at least 1971." 580 F.Supp. at 1145. For the years 1971

4. The district court determined that as to the claims against the company, the Title VII limitations period began on May 6, 1970, and that finding has not been challenged on appeal. Evidence of disparate treatment under Title VII provides the elements of intentional discrimination under § 1981. *See* Lewis v. University of Pittsburgh, 725 F.2d 910, 915 n.5 (3d Cir. 1983).

through 1978, however, approximately 26% of the foreman promotions were given to blacks -- not substantially different from their 29% representation in the work force during those years.

The record contains other anecdotal and statistical evidence on this point which should be evaluated by the district judge in the first instance. We are mindful that a finding of classwide violation is supported only when the evidence shows that discrimination was the company's standard operating procedure, rather than something which occurred only in a few isolated incidents. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). In such a situation, the trial judge's appraisal is particularly important.

Similarly, the district court's finding that the company tolerated racial harassment within the work force must be reevaluated on remand. The court stated that it had considered more than 100 incidents or practices, many of which "predated the limitation period" and about 35 of which "occurred within the limitations period or shortly before -- e.g. 'in the late 1960s' or 'between 1965 and 1970'." 580 F. Supp. at 1147. The court recognized the critical inquiry as "assessing the conditions which prevailed during the limitations period." *Id.*

Some of the instances described in detail by the district judge occurred before 1971 and some thereafter. We are unable to determine from the record what effect the application of the two year statute of limitations for the § 1981 claims would have on the district court's conclusion with respect to the harassment charge. Consequently, it too will require reexamination by the trial court.

We have surveyed the findings on the other issues and conclude that they would not be affected by the two year limitations period. Naturally, in the portion of the

case remaining to be tried for assessment of individual damages. the two year statute would apply.

II.

CLASS CERTIFICATION AND CLASS REPRESENTATIVES

A.

A second major issue presented in this case is that of class representation. In this area. too. subsequent decisional law requires review of the district court's ruling in a somewhat different light than that which prevailed at the time the court acted.

In a Memorandum of June 16. 1975. the district court certified a class of "all black persons employed by the defendant Lukens Steel Company at any time on or after June 14. 1967." This class includes persons whose employment was within the six year statute of limitations for § 1981 applied by the district court. To that extent. the class definition must be narrowed.

A review of the class allegations in the complaint and the court's certification order shows that the suit was conceived as a broad. "across the board" attack on racial discrimination at Lukens. As class representatives. the court approved Charles Goodman. Ramon L. Middleton. Romulus C. Jones. Jr.. Lymas L. Winfield. Dock Meeks. David Dantzler. and John R. Hicks. III. Each of these plaintiffs asserted specific claims of discrimination practiced against them by the company and. in several instances. by the unions as well.

Because of the nature of the claims. the court concluded that any ruling on the appropriateness of damages was premature. and therefore certified the class under Fed. R. Civ. P. 23(b)(2). *See Kyriazi v. Western Electric Co.*. 647 F.2d 388 (3d Cir. 1981). Possible definition of a class under Rule 23(b)(3) for

assessment of damages was reserved. After making its liability determinations. the court directed counsel to prepare a proposed form of notice to class members.

On appeal. defendants contend that the district court erred in allowing the individual plaintiffs who asserted injury from specific discriminatory practices to represent a broad class alleging violations beyond those of the named individuals.

Initially. we observe that contrary to the defendants' contentions. the issue here is one of compliance with the provisions of Rule 23. not one of Article III standing. Each of the named plaintiffs has presented claims of injury to himself and has alleged facts which present a case or controversy under the Constitution. *Cf. O'Shea v. Littleton*. 414 U.S. 488. 494 (1974) ("If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants. none may seek relief on behalf of himself or any other member of the class.").

The thrust of the defendants' challenge is that the injuries to the named plaintiffs are in many instances not the same as those advanced on behalf of the class. In essence. the defendants contend that the allegations of the named plaintiffs do not present "questions of law or fact common to the class" and that their "claims . . . are [not] typical of the claims . . . of the class" as required by Rule 23(a)(2) and (3). For this reason. we need only consider whether the named plaintiffs meet the requirements of Rule 23.

The expansive "across the board" class action attack on employment discrimination gained currency in a series of cases typified by *Johnson v. Georgia Highway Exp. Inc.*. 417 F.2d 1122 (5th Cir. 1969). and *Payne v. Travenol Lab.. Inc.*. 565 F.2d 895 (5th Cir. 1978). *See also Wetzel v. Liberty Mut. Ins. Co.*. 508 F.2d 239 (3d Cir. 1975); *Mack v. General Elec. Co.*.

329 F. Supp. 72 (E.D. Pa. 1971); Rutherglen, *Title VII Class Actions*, 47 U. Chi. L. Rev. 688 (1980). In *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), however, the Supreme Court pulled in the reins by insisting on actual, not presumed, compliance with the typicality and commonality provisions of Rule 23.

The Supreme Court pointed out that a named plaintiff's proof of his personal claim would not necessarily establish that the discriminatory practice was pervasive or was reflected in other employment activities. As the Court said, "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation." *Id.* at 159.

In *Falcon*, the named plaintiff alleged that he had been denied a promotion because he was a Mexican-American. The Court determined that he could not represent a class of Mexican-Americans attacking discrimination in hiring. The Court cited *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), in which named plaintiffs who were not qualified as over-the-road drivers could not represent a class of qualified drivers who complained of discrimination. Because the named plaintiffs "could have suffered no injury as a result of the alleged discriminatory practices, . . . they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury." 431 U.S. at 403-04.

Scott v. University of Delaware, 601 F.2d 76 (3d Cir. 1979), presented a similar problem. There, a former faculty member whose contract was not renewed alleged that he was a victim of racial discrimination and sued under sections 1981 and

1983 as well as Title VII. He sought to represent a subclass of applicants seeking initial faculty appointments who were also allegedly victimized by racial considerations. The district court entered judgment on the merits for the defendant on both the individual and class claims.

We determined that the plaintiff could not represent a class contesting the university's hiring procedures. Clearly, he had suffered no harm from discrimination in hiring practices since he had initially obtained a position. In that situation, absent class members might be harmed by the preclusive effect of the district court's judgment. Therefore, we concluded that the court had a duty to "consider carefully the requirement of fair and adequate protection" to the absent class members, despite the lack of a cross appeal of the class certification ruling by the defendant. *Scott*, 601 F.2d at 83.[5]

As is clear from *Scott*, assessment of the adequacy of representation initially must focus on any potential conflicts of interest between the named individuals and the class. On this record, we find no divergence that would impair the incentive of the named plaintiffs in vigorously prosecuting all aspects of the claims that are otherwise found to be adequately represented. *Scott v. University of Delaware*, 601 F.2d at 85. *See* Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 Va. L. Rev. 11 (1983).[6] The defendants have raised additional allegations of error

5. The defendant in *Scott* did challenge the propriety of the class certification in both the district court and on appeal.

6. The fact that some of the named plaintiffs did not prevail on their individual claims does not make them inadequate class representatives. *See* East Texas Motor Freight v. Rodriguez, 431 U.S. at 406 n.12 (1977); International Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259 (4th Cir. 1981).

in class certification, however, which must also be addressed.

The class representatives alleged a variety of instances of discrimination by the company and the unions in various employment practices, covering most of the claims presented by the class. Included were promotion (Middleton, Winfield, Jones), incentive pay (Meeks), discharge (Goodman, Hicks, Dantzler), harassment (Meeks), inadequate union representation (Middleton, Dantzler, Meeks), testing (Meeks), seniority system (Meeks), discipline (Dantzler), and manning of the new Strand-Cast facility (Middleton).

Defendants contend that in a number of areas the class representatives' specific allegations are distinct from those of the class as a whole. For example, none of the named plaintiffs were discharged during the probationary period. Nonetheless, some do allege that racial bias resulted in their discharge. Even though the alleged discrimination occurred after their probationary period had passed, we conclude that the typicality of their claims makes them adequate representatives under Rule 23.

The defendants' contentions are not completely without merit however. Even under an expansive view of representation, discrete areas of alleged bias exist in which the record does not demonstrate the required commonality and typicality of the class complaints with those of the individual representatives. A footnote in *Falcon* suggests that "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify" a broad class if the bias manifested itself "in the same general fashion, such as through entirely subjective decisionmaking processes." 457 U.S. at 159 n.15. We do not regard the case at hand as meeting those requirements. The findings of the district court, which

rejected some of the plaintiffs' claims, belie the existence of a "general policy" of discrimination and plaintiffs did not produce "significant proof" of such a scheme.

The district court found discrimination in the initial assignment of Lukens' newly-hired employees. To be actionable, the discriminatory practice must exist during the applicable limitations period. All of the named plaintiffs, however, were originally hired outside the limitations period, and therefore, none have a viable complaint about discrimination in initial assignment. Thus, no representative adequately represents the class in this particular claim. *See Hill v. AT&T Technologies, Inc.*, 731 F.2d 175 (4th Cir. 1984).[7]

Because in this instance a qualified class representatives is lacking, the findings applicable to it must be vacated. Economical use of judicial resources, however, requires that some thought be given to whether the work of district court and counsel with respect to this claim may yet be salvaged.

B.

We begin by acknowledging the realities of class suits, a sometimes neglected approach in this field. In a massive class action such as the one at hand, it is counsel for the class who has the laboring oar. The class representatives furnish the factual basis to invoke the jurisdiction of the court and provide the outline of the controversy, but the lawyers shape the

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7. Nor do we find appropriate class representatives for one claim resolved in defendants' favor -- that in which discrimination in the awards for suggestions made to the company was alleged. That point has not been raised by defendants or plaintiffs, and we leave it for further exploration, if desired, in the district court.

claims for adjudication by the compliation of factual and expert testimony and the presentation of statistical and documentary evidence.

That work was performed in this case by thoroughly competent counsel as to the claims in which the court found for plaintiffs as well as those where it ruled for defendants. We do not prejudge the issue but merely note the distinct possibility that the evidence presented would not have varied one iota had a qualified representative for each claim been present from the inception of the suit. If that possibility is indeed the fact, then another suit filed on such a claim by a newly qualified class representative would produce a trial that would simply repeat the previous one. That result would yield no discernable benefit to anyone but would generate substantial loss in time for court, counsel, and parties.[8]

To obviate such unnecessary duplication, on remand the district court should explore the possibility of intervention by qualified class representatives, followed by a proceeding to determine if the findings previously reached may be reinstated. That solution was suggested by the Court of Appeals for the Fourth Circuit in *Hill v. Western Elec. Co., Inc.*, 672 F.2d 381 (4th Cir. 1982). *See* Note, *Reinstating Vacated Findings in Employment Discrimination Class Actions: Reconciling General Telephone Co. v. Falcon with Hill v. Western Electric Co.*, 1983 Duke L.J. 821.

Intervention is still permissible even at this stage, *see United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), and a class action determination in some instances may be made even after appeal. *McLaughlin*

8. Such a suit would be timely since the commencement of the class action tolled the statute of limitations as to members of the class. *See* Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983); Edwards v. Boeing Vertol Co., 717 F.2d 761 (3d Cir. 1983).

v. Wohlgemuth, 535 F.2d 251, 252 n.2 (3d Cir. 1976).

As the *Hill* court observed, practical fairness should guide the district court in evaluating the propriety of intervention. For example, a witness who testified about a particular practice and who otherwise meets the necessary test may be a likely representative. *See Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326 (4th Cir. 1983). If, however, no proper class representative is available, then that claim must be dismissed as to the class. *See Scott v. City of Anniston, Alabama*, 682 F.2d 1353 (11th Cir. 1982); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608 (5th Cir. 1983). *Cf. Vuyanich v. Republic Nat'l Bank of Dallas*, 723 F.2d 1195 (5th Cir. 1984).

Assuming that a proper class representative is appointed, the next step would be to determine whether the findings from the original trial may be reinstated. In reaching a decision on this question, the district court must consider whether either side will be prejudiced. This will require determination of whether those findings would have been different had the new class representative been on board at that time. An intervenor or new class representative seeking to salvage the original findings has the burden of proving that the prior defect in class representation did not affect those determinations. In the event of such proof, the previous findings may be reinstated.

On remand, the district court has the benefit of hindsight. As the court of appeals said in the *Hill* case, "[t]o the extent inadequacy is based solely upon lack of sufficient identity of interest, any presumed adverse effect on the merits stemming from this may in fact be utterly belied by the outcome." 672 F.2d at 389. *See also Scott v. University of Delaware*, 601 F.2d at 87 n.22. If the results of the original trial were favorable to the class, then there may be no reason to assume that reinstatement would be prejudicial to the class.

The district court also has the responsibility of determining whether it would be unfair to defendants to reinstate the findings. That the net effect is to revive an adverse result is not in itself a sufficient showing of prejudice. Rather, the court should consider whether the defendants' preparation and tactics would have been different had other class representatives been in place at the earlier trial. In other words, the question is would defendants have conducted the litigation differently in some material way absent the defect in representation in the prior proceeding. *See Dickerson v. United States Steel Corp.*, 582 F.2d 827 (3d Cir. 1978). *Cf. Mullaney v. Anderson*, 342 U.S. 415, 417 (1952) (Joinder of new parties permissible where their earlier presence would not "have in any way affected the course of the litigation").

We do not limit the district court in its inquiry but only point to a few of the considerations that should be examined.

C.

Plaintiffs contend that the United Political Action Committee -- an unincorporated association composed predominantly of black citizens in the vicinity of the Lukens plant, some of whom are employed by the company -- should be permitted to act as a class representative. The record in this case does not contain adequate factual material to justify the committee's capacity to act as a class representative. *See General Telephone Co. of the Southwest v. Falcon.*

Accordingly, we conclude that on this record no named plaintiff could adequately represent the class in the claim of racial discrimination in initial work assignments. On remand, the district court may consider the intervention and appointment of appropriate class representatives as well as possible reinstatement of the original findings.

III.

CLAIMS AGAINST THE UNIONS

The district court concluded that the evidence did not support the plaintiffs' claims about racial discrimination in the general handling of grievances by the unions, including references to arbitration. The delay in processing grievances and the decision to abandon those of a less serious nature were, in the court's view, practices legitimately complained of by both black and white workers. However, the court did find that the unions discriminated against the plaintiff class in violation of both § 1981 and Title VII.

Collective bargaining agreements beginning in 1965 had prohibited the company from discriminating against any employee, probationary or permanent, on racial grounds. Nevertheless, although they knew that blacks were being discharged at a disproportionate rate during the probationary period, the locals failed to file grievances challenging that practice, pursuant to a union policy of not grieving complaints of probationary employees.[9]

The unions were reluctant to assert racial bias as a basis for a grievance even when they believed that element was implicated. The court found this policy to perpetuate the discriminatory environment and "render the non-discrimination clause in the collective bargaining agreement a dead letter." 580 F. Supp. at 1160.

The unions argued before the district court that simple inactivity could not make them liable under Title VII or § 1981. The district court rejected that contention, but went on to hold that "the evidence in this case proves far more than mere passivity on the part of the unions." The court further commented that

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9. We reject the unions' contention that the district court's findings were clearly erroneous as to this matter.

"[a] union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title [VII] and § 1981 regardless of" its leadership's favorable disposition toward blacks. *Id.* at 1160.

On appeal, the unions repeat their argument that mere passivity should not subject them to liability because such inaction is not within the scope of § 703(c) of Title VII addressing union responsibility. That section of the Act provides in pertinent part that it is an unlawful employment practice for a union:

> "(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> • • •
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

42 U.S.C. § 2000e-2(c).

The union argues that passivity does not "cause" the employer to discriminate and faults *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973), for holding a union liable without any reference to the text of the statute. Although the *Macklin* case has been criticized, *see* Larson, *Employment Discrimination*, § 44.50, other cases have echoed its premise that there is an affirmative duty on the part of the unions to combat discrimination in the workplace. *See, e.g., Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982); *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981); *Romero v. Union Pacific R.R.*, 615 F.2d 1303 (10th Cir. 1980); *Donnell v. General Motors Corp.*, 576 F.2d 1292 (8th Cir. 1978); *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372 (5th Cir. 1974).

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the plaintiffs contended that disproportionate discipline had been imposed on them because of their race. They alleged that the union "had acquiesced and/or joined in" the employer's discrimination. The Court did not accept the union's defense that in representing a number of employees it is sometimes necessary to compromise the grievance of one.

> "We reject the argument. The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them."

427 U.S. at 285.

The case against the unions here is stronger than one of mere acquiescence. The district court found that the unions intentionally avoided asserting claims of discrimination. In so doing, the unions violated the duty of fair representation owed to their members. *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944); *see also*, Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702 (1980).

By shirking their responsibility for presenting grievances based on discrimination, the unions also violated the duty to enforce the collective bargaining agreement. *See Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81 (3d Cir. 1982). The deliberate choice not to process grievances also violated

§ 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation. The district court's finding of intentional discrimination properly supports the claims under § 1981 as well. We therefore find no error in the district court's assessment of liability against the unions.

IV.

STATUTE OF LIMITATIONS AS TO THE TITLE VII CLAIMS AGAINST THE UNIONS

Plaintiff Hicks filed charges against Lukens before the Pennsylvania Human Rights Commission on December 2, 1971. The unions were not named in that complaint. On January 28, 1972, however, Hicks along with named plaintiffs Goodman, Meeks, and Middleton filed broad charges of discrimination against Lukens, the International Union, and Local 1165 with the EEOC. The Commission deferred these charges to the Pennsylvania Human Relations Commission on February 16, 1972, and filed them on May 7, 1972. Local 2295 was first named in an amended charge filed by plaintiff Meeks on June 13, 1972.

Because the statute allows the state agency sixty days to dispose of a claim, 42 U.S.C. § 2000e-5(c), the earliest that Hicks' original charge could be considered filed with the EEOC was January 31, 1972. Based on that date, the district court found that the limitation period for Title VII claims against the unions began on April 6, 1971. That determination is correct only if the initial filing in the state Commission against Lukens is construed to include claims against the unions as well.

In *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394 (3d Cir. 1976), we held that the scope of a Title VII action is defined by the limits of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. That case,

however, involved only one defendant, and we did not hold that the scope of the investigation could include unnamed parties.

Glus v. G.C. Murphy Co., 629 F.2d 248 (3d Cir. 1980), held that charges against an unnamed international union could be adjudicated because the original complaint before the EEOC had named a local union whose interests were the same and the international had received notice. Neither of those two conditions apply here. The charge filed by Hicks was not against a union, but against the employer. We do not find the commonality of interest and actual notice which would make *Glus* applicable. Therefore, no charges were cognizable against the unions until the January 28, 1972 filing with the EEOC.

In *Mohasco Corp. v. Silver*, 447 U.S. 807, 814 n.16 (1980), the Court held that "a complainant in a deferral State [as is Pennsylvania] . . . need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved." Plaintiffs ask that they be given the benefit of this 240 day rule. That would produce a limitations period commencing June 2, 1971, somewhat longer than that advocated by the unions. Although we can foresee another case in which a plaintiff might be entitled to a longer period, in light of the plaintiffs' concession here, we conclude that the June 2 starting date is appropriate.

We do not find a different limitation period applicable to Local 2295. The identity of interest and notice provisions of *Glus* are applicable in this situation: therefore, Local 2295 will be governed by the same effective limitations date, June 2, 1971.

The correction of the limitations date for Title VII claims against the unions will not affect the injunctive relief directed by the district court. It might, however,

make a difference in the assessment of damages, and accordingly we feel obligated to make a ruling on the point.

V

INCENTIVE PAY FOR THE PIT CREWS

The district court found that the company's policy of denying incentive pay to workers in the open hearth pits while making it available to other workers amounted to discrimination. The open hearth pit crews were predominantly black. Their assignment was to prepare molds to receive molten metal, pour the metal, and remove the molds after the metal had hardened. At a higher physical elevation in the plant, workers on the melting "floor" placed the raw materials into the furnaces for melting and supervised that process. These predominantly white crews received incentive pay, as did other workers in the Lukens facility.

The court reasoned that "[g]iven the fact that the company paid incentive bonuses to the 'floor' personnel. . . . [its] refusal to accord the same benefit to the pit personnel had no legitimate justification. I find that this was a clear instance of racial discrimination." 580 F. Supp. at 1138.

In reviewing factual findings made by a district court, we apply the clearly erroneous standard set out in Fed. R. Civ. P. 52(a). As the Supreme Court stated in *Anderson v. City of Bessemer City*, 53 U.S.L.W. 4314 (March 19, 1985), this standard is used "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* at 4317. The Rule clearly requires deference to the findings of the trial judge, but it does not relieve the court of appeals from its responsibility to correct findings of fact when it is left "with a definite and firm

conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

As an appellate court, we have an advantage over the trial judge in that the parties have had ample opportunity after trial to review the record in detail and point out specific references to support their position. Moreover, the attention of the litigants is restricted to a narrow area in which they hope the challenge may be successful. That process differs from the broad gauge approach which is followed in the district court, where the requests for findings are being compiled in the first instance from voluminous testimony and exhibits and without any indication of the trial court's ultimate rulings. This is particularly true in a case as massive as this one.

After a painstaking review of every record reference to which the parties have cited us, we have come to the conclusion that in this instance, a mistake was made.

It is undisputed that the incentive pay issue was one of long standing which began before the limitations period. Both testimony and documents disclose that the union on a number of occasions had asked the company to grant incentive pay to the pit crew. The employer's response was consistent -- it would include the pit crew in the incentive plan only if the company was given the opportunity to reduce the size of the crew. On each occasion, and there were several, when the employer submitted this proposition to the members of the pit crew, they rejected it. Not only did the pit crews turn down the company's proposal, but the crane crews in the pit -- another seniority subdivision -- did so as well.

One union official who discussed the company's proposal with the workers recalled that about equal numbers of black and white workers were present at a meeting to vote on the proposal. Although plaintiffs

suggest that other groups receiving incentive pay also had agreements on crew size. testimony reveals that these arrangements were not comparable to those with the pit and crane crews.

Another union witness described the particularly close relationship among the workers in the pit crew. The men consistently presented a united front to the company and were most solicitous of each member's safety and well being. When one reads the testimony against this background. it is understandable why the pit crew would not sacrifice the jobs of its members in exchange for higher pay for those who would retain their positions.

The evidence is equally clear why the employer insisted on the trade-off. Company officials testified that the pit crews were overmanned and that the facilities of the plant were limited. Any increase in efficiency had to come from a reduction in crew size. In these circumstances. incentive pay would not be economically advantageous to the company because the capacity of the facility had already been reached and increased efficiency by the already overabundant manpower could not result in greater production.

The testimony does not support any inference that denial of incentive pay was racially inspired. The company's position on a trade-off was consistently maintained and was unrelated to race. That conclusion finds reinforcement in the company's experience with the die shop workers. Early collective bargaining agreements showed that both the pit crew and die shop group were not included in the incentive pay plan. However. when the die shop employees agreed that the company would be under no restriction as to crew size. they did receive incentive pay.

The record citations to which plaintiffs have referred us do not furnish any basis for concluding

that the company's reason for denying incentive pay was pretextual. Indeed. the weakness on this point in the otherwise vigorous and well-documented plaintiffs' brief is eloquent in itself.

After our review. we conclude that the finding on incentive pay to the pit crews is clearly erroneous. and on this claim. the judgment of the district court must be reversed.

VI.

LUKENS OTHER CONTENTIONS

In addition to the matters which have been discussed above. Lukens has raised other claims of error. It contends that the trial judge erred by impermissibly shifting the burden of proof to the defendant. We find no merit to this argument. In the introduction to his opinion. the trial judge reviewed the leading cases of *Texas Dept. of Community Affairs v. Burdine*. 450 U.S. 248 (1981). and *McDonnell Douglas Corp. v. Green*. 411 U.S. 792 (1973). He stated clearly that the burden of proof was on plaintiffs. We are not persuaded that the casual references in the opinion to which Lukens points should be interpreted as contradicting the earlier unambiguous allocation of the burden of proof.

The court's opinion similarly displayed a thorough understanding of the difference between disparate impact and disparate treatment cases and of the relevant evidence under each theory. The defendant takes exception to the district judge's comment that

> "One must be careful not to over-categorize in this context. The analytical distinctions . . . are of only limited utility. The ultimate questions to be answered are essentially the same in all employment discrimination cases: Has the defendant caused a given employee or group of

employees to be discriminated against? . . . Is the action or conduct complained of justifiable . . .?"

580 F. Supp. at 1121.

We find no fault with these observations. In *Dillon v. Coles*, 746 F.2d 998 (3d Cir. 1984), we similarly commented on excessive preoccupation with the various formulae used in an employment discrimination case and observed that they are simply tools designed to aid in the analysis of evidence. The ultimate question remains whether the defendant has discriminated. The presumptions and shifting burdens are merely an aid -- not ends in themselves. When direct evidence is available, problems of proof are no different than in other civil cases. *See Trans World Airlines, inc. v. Thurston*, ___ U.S. ___, 105 S.Ct. 613, 622 (1985); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). If judges lose sight of the ultimate question, the analysis intended to aid in the process will instead have become a hinderance.

Lukens also argues that the district court misapplied evidence by failing to recognize that a statistical variation in itself does not establish discrimination unless the record also shows the requisite availability of positions and the qualification of the claimants. We do not so read the district court's opinion. In considering the statistical data presented as part of the plaintiffs' case, the court demonstrated its recognition of the limits of such evidence and the caution with which it must be viewed. The court noted that to prevail the class was required to prove that "disparate treatment exists and is the defendant's regular and standard operating procedure." 580 F. Supp. at 1120. In another part of the opinion, the court made clear that it had considered Lukens'

"attempts to show that [the plaintiffs'] comparisons are faulty because of factual dissimilarities." *Id.*

We repeat once again that the clearly erroneous rule applies to our review of factual findings, including those based in part on statistical data. Statistical proof in Title VII cases must be evaluated in light of the "surrounding facts and circumstances." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977). In *Dothard v. Rawlinson*, 433 U.S. 321, 338 (1977), Justice Rehnquist in his concurring opinion wrote, "[i]t is for the District Court, in the first instance, to determine whether these statistics appear sufficiently probative of the ultimate fact in issue. . . . In making this determination, such statistics are to be considered in light of all other relevant facts and circumstances." *See also Holsey v. Armour & Co.*, 743 F.2d 199, 215 (4th Cir. 1984).

We have reviewed Lukens' remaining contentions using this standard. We cannot say that the findings made by the district court are clearly erroneous, nor do we find error in the legal guidelines used by the court in reaching these remaining findings. Therefore, the judgment of the district court with respect to the instances of discrimination not previously discussed will be affirmed.

VII.

SUMMARY

1. The district court's findings that Lukens discriminated in transfers to salary positions and toleration of racial harassment will be vacated and the matters remanded for further consideration in light of our ruling on the appropriate statute of limitations for the § 1981 claims.

2. The district court's finding in favor of the class with respect to initial assignments will be vacated and

remanded for reconsideration in light of our ruling on class representation.

3. The limitations period pertaining to the Title VII claims against the unions shall be adjusted in accordance with the views expressed above.

4. The finding of discrimination in the denial of incentive pay for the pit crews is reversed and judgment shall be entered for the defendant on that claim.

5. In all other respects, the judgment of the district court will be affirmed.

GARTH, *Circuit Judge*, dissenting:

I agree with the majority's analysis and disposition of all the issues presented in this appeal except for one. I respectfully dissent from the majority's holding that the statute of limitations for a cause of action under 42 U.S.C. § 1981 is limited in Pennsylvania to two years rather than the six year period applied by the district court.

The court today relies on *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), in which the Supreme Court held that all claims under § 1983 should be subject to a state's corresponding personal injury statute of limitations. Although *Wilson* does not address § 1981 claims, the court concludes that *Wilson*'s reasoning compels identical limitations treatment for all reconstruction Civil Rights claims. This conclusion is inconsistent with history, precedent, and logic, and in any event is not required by *Wilson*.

While the majority's holding may not bar the civil rights claims asserted in this case, since violations of § 1981 may be found to have occurred within the shorter limitation period, the majority's discussion

and holding necessarily will have ramifications far beyond the appeal which we decide today. I therefore write separately to record my disagreement with the majority's analysis.

I.

Prior to *Wilson v. Garcia*, this court applied a case-by-case analysis in determining which statute of limitations was most appropriate for a particular civil rights cause of action. *Polite v. Diehl*, 507 F.2d 119 (3d Cir. 1974) (in banc). Under this analysis, we have generally held that claims under § 1981 are governed in Pennsylvania by that state's six-year statute of limitations. *See, e.g., Davis v. United States Steel Supply*, 581 F.2d 335, 341 (3d Cir. 1978), *cert. denied*, 460 U.S. 1014 (1983); *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 902-03 (3d Cir. 1977).

In *Davis*, we held that a § 1981 claim of racial discrimination in employment, the gravamen of which was interference with economic rights and interests rather than personal injury, should be governed by Pennsylvania's six-year limitations period, 42 Pa. Cons. Stat. Ann. § 5527 (Purdon 1982). Unless it has been overruled by *Wilson*, *Davis* would appear to control the present case, where the gist of the cause of action is economic rather than bodily injury caused by interference with the employment rights of black workers.

Wilson holds that "the federal interests in uniformity, certainty, and the minimization of unnecessary litigation" requires that all § 1983 claims be governed by the same statute of limitations in a given state: that state's personal injury statute. 105 S. Ct. at 1947. Because *Wilson* looks to § 1988 for its authority to apply state limitations periods in civil rights actions, and § 1988 by its terms covers all of the

Reconstruction sections, the majority today concludes that *Wilson* mandates that all civil rights actions be governed by a state's personal injury limitation period. This conclusion is at best an arguable extension of *Wilson*'s analysis: it is by no means the holding of *Wilson* or an inexorable outgrowth of the case. In the absence of a square holding which overrules Third Circuit precedent, however, we remain bound by *Davis* to apply the six-year limitation period. It is not enough if *Wilson* merely undermines or raises questions about our prior analysis. Until the Supreme Court actually decides the limitation period for a § 1981 claim, or unless *Wilson* would admit of no other reasonable reading, only an in banc decision of this court can overrule *Davis*. *See* Third Circuit Internal Operating Procedures VIII C.[1]

A close reading of *Wilson* reveals that the majority's view is neither an inevitable nor even the most plausible reading of the case. *Wilson*'s holding that all § 1983 claims should be decided in a given state under the same statute of limitations follows from the Supreme Court's view that § 1983 claims are best analogized to state tort actions for personal injuries. *Id.* at 1947. Having made this analogy as a matter of federal law, the Court adopted New Mexico's three-year personal injury statute of limitations out of deference to the state's judgment regarding "the proper balance between policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Id.* at 1945.

Nothing in *Wilson* addresses § 1981, which has a different history and purpose. *See* Section II infra. If

1. *Compare* Rubin v. Buckman, 727 F.2d 71, 73-74 (3d Cir. 1984) (Garth, J., concurring) (in banc hearing not necessary to overrule prior panel when earlier case violated "consistent and explicit" rule and was "obviously in conflict with Supreme Court precedent.").

Wilson has any effect on this case, therefore, it is merely to suggest that a single, uniform statute of limitations should be applied in each state to all cases under § 1981 instead of the case-by-case approach of *Polite*. Whether that would be the two-year personal injury period now applied in Pennsylvania for § 1983 claims, *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985), or some other limitation period dictated by the nature of § 1981, is a question beyond the scope of *Wilson*. Even if *Wilson* does require us to select a single statute of limitations for all § 1981 claims, it does not necessarily erase the distinctions between § 1981 and § 1983 recognized in *Davis* and *Meyer*.[2] These cases would therefore weigh heavily toward our selection of six years as the most appropriate uniform period of limitations for § 1981 claims. In short, not only does *Wilson* not require today's result, but it can plausibly be read as support for a uniform six-year statute of limitations for § 1981 claims in Pennsylvania.

II.

An examination of the history, purpose, and application of § 1981 in contrast to the history, purpose, and application of § 1983, supports the conclusion that Pennsylvania's six-year statute of limitations for contract and trespass actions is the most appropriate one to apply to the § 1981 claim before us. While it is true, as the majority notes, that both § 1981 and § 1983 are concerned broadly with

2. While *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985), discusses *Davis v. United States Steel Supply*, 581 F.2d 335 (3d Cir. 1978), *cert. denied*, 460 U.S. 1014 (1983), in following *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), *Smith* was a § 1983 case. The *Smith* court erroneously cited *Davis* as a § 1983 case decided under the discredited case-by-case approach of *Polite*, 1764 F.2d at 193. In fact, *Davis* was a § 1981 case, and as such, is not controlled either by *Smith* or *Wilson*.

protecting the equal legal status of every person before the law, and that there is substantial overlap in the cases that may properly be brought under the two sections, there are still significant differences between the two. In short, § 1983 was conceived, and has been generally applied, as a personal injury statute. Section 1981, however, is more fundamentally concerned with injury to the contractual or economic rights of minorities, and as such should appropriately be governed by the longer contract statute of limitations.

A.

42 U.S.C. § 1981 was originally enacted as section one of the Civil Rights Act of 1866, was re-enacted as Section 16 of the 1870 Act, and was later included in the 1874 recodification. *Runyon v. McCrary*, 427 U.S. 160, 169 n.8 (1976). In its present form it provides:

> **§ 1981. Equal rights under the law**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

While the "full and equal benefit" and "penalties" clauses give § 1981 broad applicability beyond the mere right to contract. *Mahone v. Waddle*, 564 F.2d 1018, 1028 (3d Cir. 1977), *cert. denied sub. nom., City of Pittsburgh v. Mahone*, 438 U.S. 904 (1978), speeches and testimony at the time of § 1981's enactment, demonstrate the predominantly economic focus of Section 1 of the 1866 Act.

Concerned with removing the badges and incidents of slavery, the legislators of 1866 believed that if economic freedom was protected, social freedom and equality would follow. Senator Trumbull, who introduced the 1866 Act, specified certain "great fundamental rights" denied to freedmen by former slave states:

> the right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property.

Cong. Globe, 39th Cong., 1st Sess. 475 (1866), quoted in *Jones v. Alfred E. Mayer Co.*, 392 U.S. 409, 432 (1968).

The bills' supporters believed that freedom would be valueless to men not assured an equal opportunity to bargain for their labors. Illustrative of this economic concern are the words of Rep. Lawrence of Ohio delivered in a detailed speech to the House:

> It is idle to say a citizen shall have the right to life, yet deny him the right to labor, whereby he alone can live. It is a mockery to say a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor.
>
> Every citizen, therefore, has the absolute right to life, the right to personal security, personal liberty, and the right to acquire and enjoy property. These are rights of citizenship. As necessary incidents of these absolute rights, there are others, as the right to make and enforce contracts, to purchase, hold, and enjoy property, and to share the benefit of laws for the security of person and property.

Cong. Globe, 39th Cong., 1st Sess. 1832.

On March 2. Rep. Windom of Minnesota stated his understanding of the scope of the bill:

> Its object is to secure to a poor weak class of laborers the right to make contracts for their labor. the power to enforce the payment of their wages. and the means of holding and enjoying the proceeds of their toil.

Id. at 1159.

In 1865. the President commissioned Brigadier General Carl Schurz to tour the five most war-ravaged states to report on conditions there and suggest measures to overcome post war problems. In Report of C. Schurz. S. Exec. Doc. No. 2. 39th Cong.. 1st Sess. at 21 (1865). Schurz concluded:

> It is. indeed. not probable that a general attempt will be made to restore slavery in its old form. on account of the barriers which such an attempt will find in its way: but there are systems intermediate between slavery as it formerly existed in the south. and free labor as it exists in the north. but more nearly related to the former than to the latter. the introduction of which will be attempted.

This intermediate state between slavery and free labor referred to by General Schurz was created in large part by the Black Codes enacted by Southern states. While specifying that blacks had the right to buy. sell. own and bequeath real and personal property. the right to contract. to sue and be sued. and to testify in court. these rights only related to blacks' relationships with other blacks. The Codes authorized unequal punishment for freedmen's offenses. restricted travel and residence. and established an etiquette of deference to whites. In addition. the Codes severely limited economic rights. Blacks were forbidden the

pursuit of certain occupations. They were subject to various master-servant statutes. vagrancy and pauper provisions that incorporated enforced labor. apprenticeship regulations. and elaborate labor contract statutes. especially pertaining to farm labor. Hyman & Wiecek. *Equal Justice Under the Law* 319-320 (1982).

It was within this historical context that the Act of 1866 and the vetoed Freedmen's Bureau Amendment were proposed. The perception of Civil Rights in the 19th century. while encompassing personal safety. was cast largely in economic terms by the definition of legal relationships. responsibilities. and remedies. It is evident. therefore. that § 1981 derived from an Act that was designed to ensure predominantly economic rights for newly freed blacks.

Moreover. 42 U.S.C. § 1982. which is recognized as a companion to § 1981. is by its plain language solely addressed to economic concerns. It reads:

> All citizens of the United States shall have the same right. in every State and Territory. as is enjoyed by white citizens thereof to inherit. purchase. lease. sell. hold. and convey real and personal property.

Reading the two sections in conjunction. the 1866 Congress intended to end all discrimination and guarantee all citizens the opportunity to participate in the free market economy. Citizens were now free to make and enforce contracts for personal services and real and personal property. From their wording and identical legislative history. the two sections have been construed similarly. Both § 1981 and § 1982 reach private conduct. *Runyan*. 427 U.S. at 170. *See Johnson v. Railway Express*. 421 U.S. 454. 460 (1975): *Tillman v. Wheaton-Haven Recreation Assoc.*. 410 U.S. 431. 439-440 (1972). Both § 1981 and § 1982 are directed at the same kind of discrimination: racial

animus. *Jones*. 392 U.S. at 426. Both sections share a similar purpose. ensuring predominantly economic rights. and have been given similar construction. *See Meyers v. Pennypack Home Owners Assoc.*. 559 F.2d 894 (3d Cir. 1979). Therefore. both sections most appropriately belong under a state statute of limitations governing economic and contract actions.

B.

Section 1983. in contrast. reveals a very different legislative history. purpose. and application from § 1981 and § 1982. Section 1983 was enacted by Congress pursuant to § 5 of the fourteenth amendment in order to enforce that amendment. *Monroe v. Pape*. 365 U.S. 167. 171 (1961).

42 U.S.C. § 1983 in its revised form reads:

> Every person who. under color of any statute. ordinance. regulation. custom. or usage. of any State or Territory. subjects. or causes to be subjected. any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights. privileges. or immunities secured by the Constitution and laws. shall be liable to the party injured in an action at law. suit in equity. or other proper proceeding for redress.

Section 1983 was enacted as section 1 of the Civil Rights Act of 1871. *Adicks v. Kress*. 398 U.S. 144. 162 (1969). It arose from and was designed to respond to an entirely different set of circumstances than those which led to the original enactment of what became § 1981. As I have previously observed in discussing § 1981. the 1866 Congress was concerned with granting freedom and equality through economic guarantees which had long been denied the now newly freed blacks. It was economic freedom which enabled a man to be free. The focus was to identify those rights.

previously denied. that would enable a person to sustain himself and his family once the mechanism of the master-slave society was dismantled. These concerns stand in sharp contrast to concerns about violence. physical injury and lawlessness that motivated the Congress of 1871.

After the passage of the thirteenth amendment and the 1866 Act. Southern resistance to Reconstruction mounted. Ku Klux Klan activity and atrocities increased. White vigilantes were described as having whipped. robbed. and murdered blacks. On March 3. 1871. President Grant. declaring that anarchy reigned in the South and that the states were powerless to control widespread violence. requested emergency legislation. In order to suppress the Klan and provide civil rights protection against official inaction and toleration of private lawlessness. Congress passed the Ku Klux Klan Act. which became known as the Civil Rights Act of 1871. *See Brisco v. LaHue*. 460 U.S. 325. 340 (1983).

In characterizing all § 1983 claims as personal injury actions for limitations purposes. the Supreme Court looked to "the historical catalyst for the 1871 Act. the campaign of violence and deception in the south fomented by the Ku Klux Klan." *Wilson v. Garcia*. 105 S. Ct. 1938. 1947 (1985). "The atrocities that concerned Congress in 1871 plainly sounded in tort . . . ." *Id.* at 1948. In characterizing claims under § 1981. we should follow the Supreme Court's analysis and look to the very different underlying purpose and historical catalyst for the Act of 1866.

C.

In addition to their contrasting histories and purposes. § 1981 and § 1983 have been applied differently. Section 1983 encompasses a broad range of actions sounding in tort. including injuries under

color of state law to a person or his property and infringements of individual liberties. *Id.* at 1948. Cases under § 1983 "often involve elements that are similar to state causes of action for personal injury." *Jones v. United Gas Improvement Corp.*, 383 F. Supp. 420, 431 (E.D. Pa. 1974). *See also Harris v. Commonwealth*, 419 F. Supp. 10, 14 (M.D. Pa. 1976).

By contrast, the vast majority of cases brought under § 1981 arise out of some economic relationship consisting of more patterned sorts of behavior, frequently involving documentary proof in the form of employment records. *Dudley v. Textron, Inc.*, 386 F. Supp. 602, 606 (W.D. Pa. 1974). Indeed, the plain language of § 1981 supports the Supreme Court's own characterization of the statute: "[Section 1981] on its face relates primarily to racial discrimination in the making and enforcement of contracts." *Johnson v. Railway Express*, 421 U.S. 454, 459 (1975).

In addition, a review of the elements of causes of action brought under § 1981 and § 1983 further suggests that the two acts should be construed separately. Section 1983 requires, by its language and purpose, state action, while § 1981 can extend to acts of private discrimination. *Mahone v. Waddle*, 564 F.2d at 1031; *Jones v. Mayer Co.*, 392 U.S. at 437; *Johnson v. Railway Express*, 421 U.S. at 460. Section 1981 also requires racial animus, *Jones v. Mayer Co.*, 392 U.S. at 426, as well as discriminatory intent. *Croker v. Boeing Co.*, 662 F.2d 975, 988 (3d Cir. 1981) (en banc); *Craig v. County of Los Angeles*, 626 F.2d 659, 668 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). By contrast, racial animus need not be an element in a § 1983 cause of action, nor is there a requirement of intentional conduct or any other particular state of mind as a prerequisite to recovery. *Parrat v. Taylor*, 451 U.S. 527, 534-535 (1980).

III.

The majority concludes that unless claims under § 1981 are governed by the same statute of limitations as those under § 1983, the federal interest in uniformity and certainty in litigation as expressed in *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), will be frustrated. The majority further concludes that, since the same facts could in some cases support a claim under either § 1981 or § 1983, applying different statutes of limitation would lead to a "bizarre result." Typescript at 12. While admittedly an overlap of 1981 and 1983 causes of action exists, that is no reason to ignore the significant differences in history, purpose, and application between the two causes of action outlined above. But just as some similarities between § 1981 and § 1983 may be recognized, so too are there differences in dimension between these two actions. These differences reflect traditional distinctions between tort and contract law which have legitimate, practical purposes under both state law and the federal Civil Rights statutes. In that context, I suggest that the majority's concerns about uniformity are misplaced and given greater weight than that to which they are entitled. Therefore, in addition to precedent and history, logic militates against today's holding.

The majority bases its uniformity argument largely on 42 U.S.C. § 1988, which provides that state law is to be consulted in setting the period of limitation for all civil rights claims. *Wilson*, 105 S. Ct. at 1943. Finding it "most significant" that § 1988 applies to both § 1981 and § 1983, typescript at 10, the majority concludes that the federal interest in uniformity in the enforcement of the civil rights statutes requires a common period of limitation.

Nothing in § 1988, however, requires that result. The statute only mandates that in cases where the laws

of the United States "are not adapted to the object" of enforcing civil rights.

> the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

If anything, this language supports a measure of deference to state law distinctions between tort and contract actions, so long as these distinctions are reflected in differences between and among the civil rights sections, and are therefore consistent with Federal law.

In fact, these tort-contract distinctions are real and substantial. First of all, as this court noted in *Meyers v. Pennypack Home Owners Assoc.*, 559 F.2d 894, 903 (3d Cir. 1979):

> "[T]he passage of time is less likely to impede the proof of facts" in a section 1981 and section 1982 action than in a state law physical injury action or a federal action under 42 U.S.C. § 1983, for example, and a longer statute of limitations may be appropriate.

(quoting *Dudley v. Textron, Inc.*, 386 F. Supp. 602 (E.D. Pa. 1979)).

Second, a longer statute of limitation for § 1981 claims relating to economic discrimination might actually *reduce* federal litigation, as a plaintiff before proceeding in federal court could afford to wait until the disposition of an administrative action -- for example, an action brought under the Fair Housing Act

or Title VII -- which would be more likely to overlap with a § 1981 action than with a § 1983 action.

That state legislatures have good reasons for distinguishing between contract and personal injury actions was noted by Justice O'Connor:

> [T]he legislative judgment to which this Court has traditionally deferred is not some purely arbitrary imposition of a conveniently uniform time limit. For example, a legislature's selection of differing limitations periods for a claim sounding in defamation and one based on a written contract is grounded in its evaluation of the characteristics of those claims relevant to the realistic life-expectancy of the evidence and the adversary's reasonable expectations of repose.

Wilson, 105 S. Ct. at 1950 (O'Connor, J., dissenting).

Similarly, there is good reason for treating § 1981 claims, which focus on economic discrimination often involving contracts and longer periods of patterned behavior, differently from § 1983 claims, which, by and large, more closely resemble torts for personal injury which result from discrete and more sharply identified events. The federal interest in uniformity and predictability is adequately served by treating alike all claims under a given section; it does not require that all claims under separate and distinct statutes be treated identically.

Furthermore, the majority's sought-after "uniformity" is illusory. Even among § 1983 claims, *Wilson* does not require identical treatment throughout the country, since different states may have different personal injury limitations periods. In fact, in *Wilson*, a three-year period was applied, rather than the two year period adopted by today's decision, 105 S. Ct. at 1949, or the one year period found

appropriated for Mississippi by the Fifth Circuit in *Gates v. Sprinks*, No. 84-4605, slip op. at 7018 (5th Cir. September 26, 1985). Thus, *Wilson* defers to state judgment on the appropriate balance of interests in setting the limitation period, even though it results in different periods being applied in § 1983 cases in New Mexico, Pennsylvania, Mississippi, and elsewhere throughout these United States. There is no reason not to defer similarly to state judgments that actions sounding in contract should be governed by a longer limitation period.

The majority's concern that applying a longer limitation period for § 1981 would lead to a "bizarre result" is unfounded. It is true that the same nucleus of operative fact sometimes could be characterized as either a § 1981 and or § 1983 claim and thereby receive different limitations treatment if the six-year statute was applied under § 1981. Such variations, however, are commonplace in the law. In a run-of-the-mill automobile accident case, for example, identical facts could give rise to warranty claims sounding in contract and strict liability claims sounding in tort -- each to be governed by a different statute of limitations. This is not thought to be a "bizarre result," and the possibility that the same or similar facts could support causes of action under different Civil Rights statutes is no more "bizarre."

Moreover, facts that could support either a § 1981 or a § 1983 claim could frequently also support a claim under Title VII, which has a 300 day limitation period in a deferral state like Pennsylvania. 42 U.S.C. § 2000e-5(e). This disparity is tolerated, however, because Title VII is distinguishable from other Civil Rights provisions, just as § 1981 is distinguishable from § 1983. Title VII covers a narrower range of situations than does § 1981, but is not limited to racial animus and does not require intentional

discrimination. "The choice [between Title VII and § 1981] is a valuable one. Under some circumstances the administrative route may be highly preferrable over the litigatory." *Johnson* v. Railway Express, 421 U.S. 454, 461 (1975). Moreover, "the remedies available under Title VII and under section 1981, although directed to most of the same ends, are separate, distinct, and independent." *Id.* Different statutes with different purposes may logically be governed by different statutes of limitation. Total uniformity in limitations periods for civil rights claims is therefore neither possible nor necessarily desirable.

In *Johnson*, 421 U.S. at 463-64, the Supreme Court stated:

> Although any statute of limitations is necessarily arbitrary, the length or period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting prosecution of stale ones . . . .

The legislatures of Pennsylvania, New Jersey, Delaware and the Virgin Islands have made such value judgments in distinguishing for limitations purposes between actions brought for contract and personal injury.[3] There is no reason why this court should not

---

3. Pennsylvania, New Jersey and the Virgin Islands apply a six-year statute of limitations for contract actions. 42 Pa. Cons. Stat. § 5527 (1981); N.J. Stat. Ann. 2A:14-1 (West Supp. 1984); V.I. Code Ann. tit. 5 § 31(3)(A) (1967). Delaware provides for three years. Del. Code. Ann. tit. 10 § 8106 (1975). Pennsylvania, New Jersey, Delaware and the Virgin Islands all apply the shorter two year limitation for actions brought for personal injury. 42 Pa. Cons. Stat. § 5524 (1981); N.J. Stat. Ann. 2A:14-2 (West 1952); Del. Code Ann. tit. 10 § 8119 (1975); V.I. Code Ann. tit. 5 § 31(5)(A) (1984 Supp.).

respect the recognition by the state legislatures that distinctions should be made, for limitations purposes, between actions for contract and personal injury, and conclude that such distinctions are properly reflected in the application of the civil rights statutes. Indeed, this court has so held. *See Davis v. United States Steel Supply*, 581 F.2d 335, 339 (3d Cir. 1978), *cert. denied*, 460 U.S. 1014 (1983); *Meyers*. Since *Wilson* does not compel a different result, we should stand by our sound prior analysis. For the foregoing reasons, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts, G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1478 & 84-1509

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., AND LYMAS L. WINFIELD, on their own behalf and on behalf of others similarly situated,

and

UNITED POLITICAL ACTION COMMITTEE, an unincorporated association, DOCK MEEKS, DAVID DANTZLER, JOHN HICKS, III, individually and on behalf of all others similarly situated

v.

LUKENS STEEL COMPANY, and INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO)

United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295, Appellants in 84-1478

Lukens Steel Company, Appellant in 84-1509

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 73-1328)

Argued June 11, 1985

Before: WEIS, GARTH, and STAPLETON, *Circuit Judges*

Opinion Filed November 13, 1985

ORDER AMENDING OPINION

IT IS ORDERED that the opinion heretofore filed be amended as follows:

Place a period at the end of footnote 1 appearing on page 4 of the slip opinion:

On page 8 of the slip opinion, delete the word "out" appearing in the fifth line of the third paragraph:

In the first full paragraph appearing on page 13 of the slip opinion, in the fourth line, change "Words" to "Woods"; in line 13, close the quotation after the word "teaching" and change the citation to read "*Rubin v. Buckman*, 727 F.2d 71, 74 (3d Cir. 1984)"; in line 17, hyphenate the word "co-exist":

In the first full paragraph appearing on page 15 of the slip opinion, in the fourth line, hyphenate the word "class-wide":

In the third full paragraph appearing on page 17 of the slip opinion, in the fourth line, delete the word "the" before the word "defendants":

In the section title appearing on page 30 of the slip opinion, place a period after the Roman numeral "V".

BY THE COURT,

/s/ Joseph F. Weis, Jr.

United States Circuit Judge

Dated: November 22, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1478 & 84-1509

CHARLES GOODMAN, et al.,

Plaintiffs-Appellees

v.

LUKENS STEEL COMPANY, and INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO),

Defendants-Appellants

(D.C. Civ. No. 73-1328)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*.

The petition for rehearing filed by Plaintiffs-Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

voted for rehearing by the court in banc. the petition for rehearing is denied.

Judge Gibbons would grant rehearing in banc.

Judges Garth and Becker would grant rehearing in banc only with respect to the statute of limitations issue. Judge Garth's Statement Sur Petition for Rehearing is attached hereto.

BY THE COURT.

/s/ Joseph F. Weis. Jr.

Circuit Judge

DATED: January 7. 1986

STATEMENT OF JUDGE GARTH SUR PETITION FOR REHEARING

I would grant rehearing only on the issue of whether actions pursuant to 42 U.S.C. § 1981 must be governed by a uniform personal injury statute of limitations as are actions pursuant to § 1983 under the rule of *Wilson v. Garcia*. 105 S. Ct. 1938 (1985). I believe the panel majority in this case wrongly decided this question for three reasons.

First. on its face. *Wilson v. Garcia* only governs actions under § 1983. Even a moderately expansive reading of *Wilson* would require only that *each section* of the Reconstruction civil rights acts be governed by an appropriate. uniform statute of limitations. The *Wilson* court focused on the history. purpose. and application of § 1983 in concluding that actions under *that section* are most appropriately governed by a state's personal injury limitation period. *Wilson*

therefore does not control the disposition of the present case.

Second. the history. purpose. and application of § 1981 reflects that the section was conceived and has been applied primarily as a means of protecting *economic* rights. such as those involving labor. property. and contracts. As such. § 1981 is best governed by the longer statute of limitations provided in most states for actions in contract.

Third. the "uniformity" sought by the panel majority in the application of the civil rights laws is nothing less than chimerical. It is quite common for a complaint to join causes of action governed by different statutes of limitations -- whether the joined claims involve tort and contract. federal civil rights claims and state claims. or § 1981 and § 1983 claims. Different statutes of limitation are applied because different sorts of interests are protected by the different provisions. and the states have made policy choices in balancing rights against the practical problems of trying stale claims.

Most states have concluded that economically grounded causes of actions will more frequently arise from patterned and well-documented courses of conduct than will claims for personal injury. and that it is therefore fair to bring such economic claims up to six years after they arise. There is no reason we should not respect these policy choices. grounded as they are in real and substantial differences between and among causes of action. in applying civil rights statutes which reflect the same differences.

I have more fully set out these reasons with supporting authorities in my dissent from the panel opinion. I have voted to grant rehearing here because I believe that this issue will arise with great frequency in cases brought before the federal courts. Thus. the majority's holding will have far-reaching consequences

by unjustifiably barring many cases brought under § 1981 through the application of a shorter personal injury statute of limitations.

Because of the importance of this question. I believe full court consideration is warranted.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., and LYMAS L. WINFIELD, on their own behalf and on behalf of others similarly situated and UNITED POLITICAL ACTION COMMITTEE, an unincorporated association, Plaintiffs v. LUKENS STEEL COMPANY, and INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 1154, UNITED STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO), Defendants	CIVIL ACTION NO. 73-1328

MEMORANDUM AND ORDER

FULLAM, J. June 16, 1975

Plaintiffs claim that the defendant steel company has engaged in racially discriminatory employment practices, and that the defendant unions have, for racial reasons, inadequately represented them. Plaintiffs seek declaratory, injunctive and compensatory relief, and seek a ruling that this action may be maintained as a class action under Rule 23(b)(2). The defendant Lukens opposes class designation, and the defendant unions seek to limit the class to issues involving injunctive relief. Certain additional individuals seek to intervene as plaintiffs, with the approval of the present plaintiffs; the defendant Lukens opposes the intervention, in all but

one instance, while the defendant unions do not oppose intervention.

The action is brought, *inter alia*, under 42 U.S.C. §1981, so the appropriate statute of limitations is that of the most nearly analagous state cause of action. *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757 (3d Cir. 1971). I have concluded that the applicable Pennsylvania statute is the six-year limitation provided in 12 Purdon's Stat. Annot §31. Under this view, claims arising on or after June 14, 1967 are cognizable in this action. The appropriate class, therefore, would seem to be

> "all black persons employed by the defendant Lukens Steel Company at any time on or after June 14, 1967."

Contrary to Lukens' contentions, I conclude that the named plaintiffs are adequate representatives of such a class. While the earliest act of discrimination in the case of the plaintiff Middleton is charged to have occurred in June of 1966, he also alleges additional discriminatory actions in 1970 and thereafter. In short, all of the named plaintiffs have asserted individual claims which are not time-barred.

I am satisfied that the proposed class is sufficiently numerous, and that all of the other requirements for a 23(b)(2) class action have been met in this case.

I do not believe it is appropriate on the present record to make a definitive ruling at this time as to whether or not claims for damages are appropriate for class action treatment. In some situations, a pervasive discriminatory practice may adversely affect large enough numbers of people, in sufficiently similar fashion, that the award of damages in a class action context is appropriate. In such situations, damages may be awarded as an incident to injunctive or declaratory relief under 23(b)(2).

On the other hand, it seems probable from the averments of the complaint in this case that any damage

claims are highly individualized. Thus, individual claims would have to be asserted and individually considered. And it is entirely possible, as the defendants suggest, that the number of potential class members having damage claims would be too small to justify class action treatment of damage issues, standing alone.

If this action proceeds as a (b)(2) class action, and if plaintiffs prevail on the merits, there would seem to be no valid objection to permitting individual class members to prove and recover their individual damages. If the action proceeds as a (b)(2) class action, and the defendants prevail, that result would presumably bar individual claims by class members for damages resulting from the discriminatory practices alleged in this case, although it presumably would not bar some kinds of closely related individual claims based upon isolated acts of discriminatory treatment not forming part of the pattern or practice alleged in this case.

In a (b)(2) class action, there is no opportunity for class members to withdraw from the action. If I were to rule at this time that no damage issues are entitled to class action treatment, each class member who may have, and wish to assert, a claim for damages would be forced to take individual action. This would largely neutralize the principal benefits of Rule 23. Moreover, it is conceivable that many class members may be sufficiently aware of the pendency of this action to be relying upon this case as having tolled the statute of limitations, but may not be following its course so closely as to become aware of the implications of a denial of class action treatment of damage issues, insofar as the statute of limitations is concerned. I recognize that these difficulties could be obviated by insisting upon full compliance with the requirements of Rule 23(b)(3). But in view of the nature of the claims asserted, the relative financial positions of the parties, and the burdens which compliance with Rule 23(b)(3) might entail, I believe it would be

premature at this time to impose that condition. The primary thrust of this litigation is for injunctive and declaratory relief, and I believe it would be preferable to postpone definition of the precise status of damage claims until a later stage of the litigation.

The sole basis for opposing intervention by Messrs. Dantzler and Hicks is that they did not pursue claims before the EEOC. On the authority of *Otis v. Crown Zellerbach*, 398 F.2d 496, 499 (5th Cir. 1968), I conclude that this objection is without merit.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., and LYMAS L. WINFIELD, on their own behalf and on behalf of others similarly situated and UNITED POLITICAL ACTION COMMITTEE, an unincorporated association, Plaintiffs v. LUKENS STEEL COMPANY, and INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO), Defendants	CIVIL ACTION NO. 73-1328

ORDER

AND NOW, this 16th day of June, 1975, it is ORDERED:

1. That this action may be maintained as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2), on behalf of a class consisting of all black persons who are, or who at any time on or after June 14, 1967 have been, or who in the future may be, employed by the defendant Lukens Steel Company.

2. That the motion to intervene as parties plaintiff, filed by Dock Meeks, David Dantzler and John Hicks, III, is GRANTED.

_____

J.

Charles GOODMAN, et al.
v.
LUKENS STEEL COMPANY, et al.
Civ. A. No. 73-1328.

United States District Court,
E.D. Pennsylvania

OPINION AND ORDER

FULLAM, District Judge. February 13, 1984

INTRODUCTION

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INTRODUCTION

Plaintiffs in this class action alleging racial discrimination in employment seek equitable and monetary relief against both the defendant employer, Lukens Steel Company, and the defendant labor unions, the International and two local unions of the United Steelworkers of America. This Opinion addresses liability issues.

REVIEW OF LEGAL PRINCIPLES

A. *Title VII and §1981*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, is "a broad remedial measure, designed 'to assure equality of employment opportunities.'" *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 1783-84, 72 L.Ed.2d 66 (1982) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 1823, 36 L.Ed.2d 668 (1973)). The Act bars not only overt employment discrimination — discrimination by disparate *treatment* — but also policies that are superficially neutral but discriminatory in operation — discrimination by disparate *impact*. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). Both types of discrimination are here alleged both by the individual plaintiffs and by the plaintiff class.

As the Supreme Court has noted, disparate treatment is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.
International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977).

The plaintiffs must show "not only 'the existence of disparate treatment but also that such treatment was caused by purposeful or intentional discrimination.'" *Smithers v. Baular*, 629 F.2d 892, 895 (3d Cir. 1980) (citations omitted).

The standard method or proving disparate treatment entails three steps. First, plaintiffs must establish a *prima facie* case. Next, the employer must articulate a legitimate business justification for its actions. If the employer does so, plaintiffs must then demonstrate that the proffered justification is merely a pretext for intentional discrimination. *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1825. Although the burden of production thus shifts from the plaintiff to the defendant and back again, the burden of persuasion remains with the plaintiffs throughout. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). In the Title VII context, the term "*prima facie* case" refers to the "establishment of a legally mandatory, rebuttable presumption" rather than the presentation of "enough evidence to permit the trier of fact to infer the fact at issue." *Id.* at 254 n. 7, 101 S.Ct. at 1094 n. 7 (1981).

The *McDonnell Douglas* plaintiffs alleged only discrimination in hiring; the particular elements of the *prima facie* case there identified have been modified to cover discrimination in other contexts. *See* B. Schleir & P. Grossman, Employment Discrimination Law (2d ed. 1983) 1318-1321 nn. 82-90 (collecting and discussing cases on discharge, discipline, promotion, transfer, layoff, training, and job assignment).

Although an individual alleging disparate treatment is free to introduce direct evidence of a discriminatory intent, as a practical matter plaintiffs typically must rely on indirect evidence from which an inference of such intent can be drawn. Frequently, plaintiffs argue that the employer applied various policies differently to black and white employees; in response, the employer attempts to

show that those comparisons are faulty because of factual dissimilarities. As trier of fact, the trial court must resolve these competing claims. *See, e.g., Worthy v. U.S. Steel Corp.*, 616 F.2d 698, 702-03 (3d Cir. 1980).

At least in theory, the *McDonnell Douglas* analysis is also applicable to class actions alleging a "pattern or practice" of classwide disparate treatment. *Teamsters*, 431 U.S. at 355, 97 S.Ct. at 1854. The class plaintiffs must initially demonstrate, by a preponderance of the evidence, that a pattern of disparate treatment exists and is the defendant's regular and standard operating procedure. *Id.* Such evidence frequently takes the form of statistical data. *See Hazelwood School District v. U.S.*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977); *Wilmore v. City of Wilmington*, 699 F.2d 667 (3d Cir. 1983). Once plaintiffs have produced such data, the defendant may rebut by showing flaws in the data or the statistical analysis. Absent a persuasive rebuttal, the court will infer that all class members were discriminated against in the fashion alleged.

The second, and more prevalent, theory of liability under Title VII allows plaintiffs to challenge employment policies which, though neutral on their face, are discriminatory in operation. These "disparate impact" cases do not require proof of discriminatory motive. *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854. In *Griggs* and its progeny, especially *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), the Supreme Court has articulated the procedure for proving such claims. The plaintiffs must first establish a *prima facie* case that the challenged procedure does in fact have a substantial adverse impact. Plaintiffs must also demonstrate "a causal connection between the challenged policy or regulation and a racially unequal result." *EEOC v. Greyhound*, 635 F.2d 188, 193 (3d Cir. 1980). The defendants can then attempt to demonstrate that those statistics are deficient and thus insufficient to make out a *prima facie* case. *Dothard v. Tawlindson*,

433 U.S. 321, 331, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977).

If plaintiffs succeed in establishing a *prima facie* case, defendant must justify the challenged policy as job-related or otherwise a business necessity. *Albemarle*, 422 U.S. at 425, 95 S.Ct. at 2375. The burden of persuasion, however, remains with the plaintiffs; defendant's rebuttal burden is simply to "come forward with evidence to meet the inference of discrimination raised by the *prima facie* case." *Croker v. Boeing Co.*, 662 F.2d 975, 991 (3d Cir.1981 (*en banc*)). If the defendant does so, plaintiffs must then show that "a feasible yet less onerous alternative exists." *Id.* (citations omitted). It has long been established that properly validated job-related tests are permissible even if they have a disparate impact. *Griggs*, 401 U.S. at 433-36, 91 S.Ct. at 854-856. Similarly, a bona fide seniority system — one which was not adopted with intent to discriminate — does not violated Title VII even though it has a discriminatory effect. *Teamsters*, 431 U.S. at 348-55, 97 S.Ct. at 1861-1864.

Section 1981

Section 1981 prohibits intentional racial discrimination in making and enforcing contracts and in securing "equal benefit of all laws and proceedings." 42 U.S.C. §1981. Proof of discriminatory intent is crucial; the provision, "does not extend to facially neutral conduct having the consequences of burdening one race more than the other." *Croker*, 662 F.2d at 989. Although disparate impact thus is not itself actionable under §1981, evidence of such impact "may be an important factor in proving racially discriminatory intent." *Id.*

Variations on the *McDonnell Douglas* formula for making out a *prima facie* case have also been applied in §1981 cases. *See, e.g., Baldwin v. Birmingham Board of Education*, 648 F.2d 950, 955 (5th Cir.1981); *Tagupa v. Board of Directors*, 633 F.2d 1309, 1312 (9th Cir.1980). As under Title VII, once the plaintiffs have made a *prima facie* case, defendant must show a legitimate reason for

its actions; thereafter, plaintiffs must show defendant's proffered reason is merely a pretext. *Baldwin*, 648 F.2d at 956.

To summarize, "disparate treatment" means simply that on a given occasion, one or more employees were treated less favorably because of their race; "pattern or practice" means simply a generalized version of this phenomenon; and "disparate impact" means simply that facially neutral policies or decisions have had a different, and adverse, impact on employees of a particular race.

One must be careful not to over-categorize in this context. The analytical distinctions outlined above are of only limited utility. The ultimate questions to be answered are essentially the same in all employment discrimination cases: Has the defendant caused a given employee or group of employees to be discriminated against? Because of race? Because of something that occurred within the limitations period? If the answers to all of these questions are in the affirmative, is the action or conduct complained of justifiable, by reason of business necessity, a bona fide seniority system, or other legitimate factor? Both statistical and anecdotal evidence may be looked to in attempting to answer these questions (with, obviously, varying degrees of relevance and probative force).

Finally, a word about "intentional discrimination" or "discriminatory animus." The aim of the law is equality of treatment and equality of opportunity for all races. Attainment of that lofty goal can be expected, in the long run, to ameliorate subjective racial attitudes, but such attitudes are not directly implicated in the enforcement scheme. An employer who hates Jews or Negroes, but who suppresses those feelings and treats all races and creeds evenhandedly, is not in violation of either Title VII or §1981. On the other hand, an employer who admires and respects all races equally, but who knowingly excludes qualified blacks from consideration for promotion

because they are black, is guilty of intentional discrimination. An employer may inadvertently discriminate (as, for example, if the employer is unaware of the racial identity of the affected employee, or is unaware of the adverse treatment); there is no liability for such inadvertent consequences because, without more, an inference of an intent to discriminate on racial grounds would not be supportable. But an employer who persists in implementing racially neutral policies or practices with actual awareness that they adversely affect blacks in comparison to similarly situated whites, is, in the absence of some overriding justification (such as adherence to a bona fide seniority system, or business necessity/job-relatedness) in violation of Title VII.

B. *Limitations Period*

This action was instituted on July 14, 1973. The appropriate limitations period for claims arising under 42 U.S.C. §1981 is six years (derived from the then-pertinent Pennsylvania statute, 12 P.S. §31). *Davis v. U.S. Steel Supply*, 581 F.2d 335 (3d Cir. 1978).

The applicable limitations period for claims arising under Title VII of the Civil Rights Act is set forth in §706(e) of that statute, 42 U.S.C. §2000e-5(e), as amended in 1972. The 1972 amendments apply to all cases in which charges were then pending before the EEOC. In the present case the plaintiffs Dantzler, Hicks, Goodman, Meeks and Middleton had charges pending before the EEOC when the 1972 amendments became effective. In these circumstances, the limitations period is measured from the original filing date in each case, not merely from the effective date of the 1972 amendments. See *Wood v. Southwestern Bell Telephone Co.*, 580 F.2d 339 (8th Cir.1978); *Inda v. United Airlines*, 565 F.2d 554, 560-61 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007, 98 S.Ct. 1877, 56 L.Ed.2d 388 (1978); *Dickerson v. United States Steel Corp.*, 439 F.Supp. 55, 69, n. 11

(E.D.Pa.1977), *vacated on other grounds, sub. nom. Worthy v. United States Steel Corp.*, 616 F.2d 698 (3d Cir. 1980).

It is clear that, with respect to the claims of the plaintiff class, all class members are entitled to the benefit of the earliest filing date of the named plaintiffs. *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 246 (3d Cir.1975), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975). Indeed, there is authority for the proposition that all class members are entitled to the benefit of the earliest filing by any member of the class, whether or not named as a plaintiff. *Webb v. Westinghouse Electric Corp.*, 78 F.R.D. 645, 653 n. 3 (E.D.Pa. 1978).

The plaintiff Dantzler first filed charges before the EEOC on December 7, 1970, followed by a related filing with the Pennsylvania Human Relations Commission on December 31, 1970. This action was filed within 90 days after Dantzler received his right-to-sue letter, and he was a member of the class. His bar-date, for all claims fairly encompassed within the charges filed, is May 4, 1970 (300 days before March 1, 1971, the date 60 days following his initial filing with the Pennsylvania Human Relations Commission). In his original charges, Dantzler asserted a pattern of racial harassment, and discrimination in disciplinary decisions; his original charges named only Lukens as culpable. On August 10, 1972, Dantzler amended his charges to include the unions, and was thereafter permitted to intervene as a named plaintiff in this action.

The net effect of these circumstances, in my view, is that the entire class is permitted to assert Title VII claims against Lukens for the alleged pattern of racial harassment, and for discriminatory treatment in the administration of discipline, from and after May 4, 1970.

The named plaintiffs Goodman, Meeks, Hicks and Middleton filed broadscale charges against both Lukens and the union, before the EEOC, on January 28, 1972.

This produces a starting date of April 6, 1971, for (a) all claims against the union defendants, and (b) all claims against Lukens not encompassed within the original filing by the plaintiff Dantzler.

To summarize, the following claims are cognizable in this litigation: (1) all claims for intentional discrimination, in violation of 42 U.S.C. §1981, arising after July 14, 1967; (2) claims for Title VII violations by the defendant Lukens, in the form of racial harassment and discriminatory discipline, arising after May 4, 1970; (3) all other claims for class-wide discrimination, against both Lukens and the union defendants, arising after April 6, 1971; and (4) irrespective of the class issues, the individual claims of disparate treatment asserted by those individual plaintiffs who have been issued right-to-sue letters by the EEOC.

Thus, nothing which occurred before July 14, 1967 can support the grant of any relief in this litigation. Evidence concerning pre-1967 events is relevant only to the extent it sheds light upon events which occurred during the limitations period. And nothing which occurred before May 4, 1970, can support the grant of any relief in this litigation absent proof of discriminatory animus.

FINDINGS OF FACT, AND DISCUSSION

I. THE PARTIES

1. Named plaintiffs Charles Goodman, David Dantzler, Jr., Ramon Middleton, John R. Hicks, III, Dock L. Meeks, Lymas Winfield and Romulus Jones are black employees or former employees of the defendant Lukens Steel Company. Dantzler, Middleton, Hicks, Meeks and Goodman are or were hourly employees; Winfield has worked in both hourly and salaried positions; and Jones is a salaried employee. The named plaintiffs represent a class consisting of all black persons who are, or who at any time on or after June 14, 1967

have been, or who in the future may be, employed by Lukens.

2. Plaintiff United Political Action Committee ("UPAC") is an unincorporated association formed to combat race discrimination in Chester County. In 1973, 32 of its members were past or present employees of Lukens (and were black). UPAC had received many complaints of racial discrimination at Lukens before this suit was filed.

3. Defendant Lukens is the oldest independent steel company in continuous production in the United States, and produces a variety of specialty plate steel products. Lukens' major production facility is located in Coatesville, Pennsylvania, and Lukens is the largest employer in Chester County. Until the mid-1950s, Lukens actually consisted of three separate corporations: Lukens Steel Company, By-Products Steel Company and Lukenweld, Inc. During the period of time directly involved in this litigation, all had been merged into a single corporation, Lukens Steel Company.

4. The total Lukens work force since 1967 has varied between approximately 4,200 and 5,300 employees. The total number of hourly employees at Lukens since 1967 has ranged between approximately 2600 and 3900.

5. Between 1967 and 1978, the percentage of black employees in the hourly work force at Lukens ranged from 21.8% to 24.1%.

6. The defendant United Steelworkers of America ("the International Union") and its local unions, the defendant Unions 1165 and 2295 ("the Local Unions") are labor unions, and are the certified collective bargaining agents of Lukens' hourly employees.

A predecessor of the International Union, the Steelworkers Organizing Committee ("SWOC") became the certified collective bargaining agent of Lukens' hourly employees in 1937. At or about the same time, Local 1165 began to represent hourly employees of Lukens

and By-Products Steel Company, and Local 2295 began to represent Lukenweld employees.

II. JURISDICTION AND PROCEDURAL MATTERS

7. On December 7, 1970, named plaintiff David Dantzler, Jr. filed a charge of employment discrimination against Lukens with the Equal Employment Opportunity Commission ("EEOC"), alleging that he had been wrongfully terminated from employment on December 4, 1970, because of race. On December 31, 1970, Dantzler filed the same charge against Lukens with the Pennsylvania Human Relations Commission ("PHRC"). On August 10, 1972, Dantzler filed an amended charge of discrimination with the EEOC against both Lukens and Local 1165, alleging that, for reasons of race, Local 1165 had failed to represent him adequately in his disputes with Lukens.

8. On March 9, 1971, named plaintiff Ramon Middleton filed a charge of employment discrimination against Lukens with the Pennsylvania Human Relations Commission, alleging racial discrimination in the staffing of the (then new) Strand Casting Subdivision, on or about March 1, 1971.

9. On January 28, 1972, named plaintiffs Middleton, Goodman, Meeks and Hicks filed with the EEOC broad charges of pervasive racial discrimination by Lukens and the International Union. Middleton, Meeks and Hicks also named Local 1165 in these charges. At a later date, Hicks deleted the unions from his charges, and Meeks amended his charges by adding Local 2295.

10. In due course, the EEOC found no probable cause to believe Title VII violations had occurred with respect to the various individual charges, and issued "right-to-sue" letters as follows: to Goodman on March 14, 1973; to Dantzler on March 30, 1973; to Middleton on April 13, 1973; to Hicks on June 6, 1973; and to

Meeks on December 12, 1973. Although finding no probable cause to support the individual complaints, the EEOC did make a finding to the effect that Lukens under-utilized black employees on a plant-wide basis, and "has excluded blacks as a class from its supervisory and clerical positions. . . ." Because these findings relate to matters not encompassed within the specific charges then pending before the EEOC, they have no probative weight in the present case. They represent merely an adverse finding on issues which the company had never been called upon to defend. Their (marginal at best) relevance to this case is that they were communicated to Lukens and the unions, and therefore arguably should have alerted them to potential problems which should be addressed.

11. Plaintiffs Goodman, Middleton, Jones, Winfield and UPAC filed this suit on June 14, 1973. On June 16, 1975, the court granted plaintiffs Hicks, Dantzler and Meeks leave to intervene as parties plaintiff, and certified the case as a class action.

12. A hearing on plaintiffs' request for a preliminary injunction was held on October 2, 3, and 4, 1979. At the conclusion of the hearing, the court rendered certain oral findings of fact and conclusions of law, and granted partial relief in a written order dated October 9, 1979.

13. The trial encompassed 32 days of testimony, over the period from February through June 1980.

14. After the testimony was transcribed, the parties submitted voluminous requests for findings of fact and conclusions of law, comments upon their adversaries' requests, post-trial briefs, etc. Plaintiffs' requests for findings of fact number 693 (many with numerous subparagraphs), covering 345 pages. The defendant Lukens filed a 595-paragraph, 265-page "response," and also filed its own request for findings of fact, numbering 550, set forth in 290 pages. The unions' "comments"

cover 260 pages plus 2 appendices; and the unions submitted 427 separate findings of fact, covering 353 pages. In all, these materials aggregate 1,773 pages.

In addition, plaintiffs submitted a 78-page post-trial brief; defendant Lukens' brief runs to 114 pages; the unions filed an 89-page brief with a 58-page appendix; and plaintiffs' reply brief totals 139 pages. Thus, the court was faced with some 478 pages of briefing. In addition, counsel have favored the court with a steady stream of letter-briefs clarifying, refining, and updating their respective positions.

III. BACKGROUND INFORMATION CONCERNING THE ORGANIZATION OF THE WORK FORCE AT LUKENS

A. *Hourly Work Force*

15. The relationship between Lukens' hourly employees and the company has been governed by collective bargaining agreements entered into every several years since 1937. Since 1957, these agreements have required hourly employees to hold union membership and pay union dues.

16. Lukens and the unions have regularly included in the Lukens' collective bargaining agreements the same terms and conditions adopted by the International Union and the largest nine or ten steel companies. This is known as "pattern bargaining."

17. Each hourly job at Lukens is assigned a job class rating, ranging from job class 1 to job class 27, which determines the average hourly wage rate for the job. For example, under the August 1, 1974 collective bargaining agreement, employees in job class 1 received a base wage rate of $4.305 per hour, while those holding job class 27 jobs received $6.805 per hour.

18. In accordance with the collective bargaining agreements, jobs rated at job class 5 and above, and one-third of the jobs rated in job class 4, are formally divided

into job groups known as seniority subdivisions. As of July 14, 1973, there were 68 seniority subdivisions at Lukens.

19. All jobs rated at job classes 1, 2 and 3, and two-thirds of the jobs rated at job class 4, are not included within any seniority subdivision, but are part of one large job group known as the "pool". Since 1965, the pool jobs have been divided among seven "area pools," each of which relates to a group of seniority subdivisions. There are, however, some seniority subdivisions which have no related "area pool".

20. Lukens' hourly employees accumulate two kinds of seniority. "Company seniority" is based upon length of service as an employee of Lukens; "subdivision seniority" is measured by the duration of employment within a particular subdivision. Employees holding "pool" jobs do not accumulate any subdivisional seniority.

21. If an employee leaves a subdivision (for example, by way of layoff or voluntary transfer) and begins work in another subdivision, he continues to maintain the subdivisional seniority he had accumulated in his former unit. From the date he begins working in his new unit, however, he begins to accumulate subdivisional seniority only in that unit. Thus, an employee cannot accumulate subdivisional seniority in more than one subdivision at a time.

22. When a job vacancy occurs within a seniority subdivision, qualified employees actually holding jobs within that unit have the first preference to fill the vacancy, in order of their respective subdivisional seniority. The company is not required to provide formal notice of a job vacancy to employees within the unit where the vacancy occurs, and the practice of providing such notice differs from unit-to-unit, but in fact such notice is usually provided, in one form or another.

23. If no employee actually working in a seniority subdivision seeks to fill a job vacancy occurring in that unit, employees who have previously been laid off from

that subdivision are recalled on the basis of subdivisional seniority. Thus, employees retain "recall rights" to jobs in units from which they have been laid off or have transferred, but they may only exercise such rights if no employee actually working in that unit desires to fill the vacancy.

24. If a job vacancy cannot be filled from among employees actually working in the unit, or from employees exercising recall rights to the unit, employees working anywhere in the plant may transfer to the vacant position; assuming ability and physical fitness are relatively equal, company seniority governs the selection.

25. Before August 1, 1971, there was no plant-wide posting or any other formal notice of job vacancies not filled from within the unit or by the exercise of recall rights. Employees interested in transferring to a different subdivision were permitted to file with the Employment Department forms, known as "request for transfer" forms, on which they designated their job preference. Vacancies which could not be filled from within the unit or through recall rights were supposed to be filled by the employment office by selecting the qualified employee with the most company seniority who had a request for transfer form to that unit on file.

26. Since August 1971, the collective bargaining agreements have required that notices of job vacancies which could not be filled from within the unit or through recall rights were to be posted at the various clock stations throughout the plant. Employees desiring to apply for the vacancy sign their names on a list maintained by the Employment Department. If they sign the list within the time period specified in the notice, they are entitled to consideration on the basis of their company seniority. If they sign up after the deadline (below the "red line"), they are eligible for consideration on the basis of their company seniority, but only if the vacancy cannot be filled from among those whose applications were timely.

27. Under the various collective bargaining agreements, seniority (whether company or subdivisional) is the deciding factor in determining who receives a vacant job only when ability and physical fitness are relatively equal. Both before and after June 14, 1967, the company has used a variety of tests to determine eligibility for various hourly jobs, and has also based eligibility on an employee's disciplinary record with the company, and his supervisory evaluations.

28. Layoffs within a seniority subdivision are governed by subdivisional seniority, the least senior employee being laid off first. If an employee is laid off from one seniority subdivision but has previously worked in another subdivision, he may "bump" any employee in the other subdivision who has less subdivisional seniority in that unit. If an employee laid off from a subdivision is unable to "bump" into another subdivision, he may replace any employee holding a pool job who has less company seniority.

29. The foregoing procedures concerning transfers, promotions and layoffs have been in effect since the early 1940s, except that the rules governing "pool" jobs were instituted in 1962, and the rules governing plant-wide posting of job vacancies were instituted in August 1971.

B. *Salaried Work Force*

30. The salaried employees at Lukens range from operating management and professional personnel to plant guards and janitors.

31. Managerial positions are arranged in the following hierarchy of jobs, from the highest level to the lowest:

Officers (approximately 11 to 13)
Managers (approximately 23 to 26)
Superintendents (approximately 30)
Supervisors (approximately 40)
General foremen (approximately 60)
Foremen (approximately 300)

32. The first step in filling a salaried vacancy is the issuance of a requisition by supervisory personnel in the area where the vacancy exists. This requisition must then be approved by the Lukens' Salary Committee. If approved, the requisition is next sent to Employment Department personnel, who attempt to find a candidate to fill the vacancy, although the supervisory employees in the area where the vacancy exists may suggest a candidate or candidates. No formal notice of salaried job vacancies is given to Lukens' employees.

33. The Employment Department has used a variety of tests in selecting eligible candidates for salaried jobs, and also considers such matters as work experience, skill and knowledge, education, personality, temperament, and company service. There are no written guidelines. In all instances, the ultimate selection of a candidate to fill the vacancy rests within the discretion of supervisory personnel in the area where the vacancy occurs. The process of filling salaried vacancies has remained essentially the same since at least 1954.

III-A. INTRODUCTION TO FINDINGS ON THE MERITS

It is of particular importance in this case, in assessing the implications of the statistical and other "pattern or practice" evidence, to bear in mind the particular characteristics of the Lukens operation. The specialty steel industry involves the application of skills which are unique to the specialized manufacturing process in question. This is not a situation in which trade or craft skills found in the general work force, or acquired in other types of industry, are readily adaptable to Lukens' needs (with certain limited exceptions, such as welding, truck-driving, and some rough carpentry). The vast majority of the Lukens hourly work force start from scratch, and are trained on the job. Indeed, Lukens has always

prided itself upon its general policy of promoting from within.

By the same token, since most hourly employees commence their service with the company at the bottom of a career ladder, as laborers of some kind, there are no threshold educational or experiential requirements: physical health and amenability to training are the essential qualifications.

As an abstract proposition, therefore, it would be permissible to conclude that, if there is not and never has been racial discrimination at Lukens, there should be no substantial disparity between black and white employees in terms of job classifications, base wages, earnings and working conditions. That is, while the abilities, interests and motivations of individual employees undoubtedly differ, there is no reason to assume that such differences significantly favor either racial group.

There are, however, very substantial disparities between black and white employees of Lukens, in each of the various matters mentioned above. Moreover, it is abundantly clear that, in the past, blacks at Lukens (as, unfortunately, in many other industrial establishments) were discriminated against. They were permitted to work only in certain operating units (performing the least desirable kinds of work, generally speaking); had fewer opportunities for advancement, and therefore tended to be clustered in the lower job classifications; and were more likely to suffer disciplinary sanctions. In addition, they were exposed to a wide range of racial harassments. Locker rooms and rest rooms were segregated; racial animosity was openly expressed, orally, in writing, and by deed; and they were in general treated as second-class citizens. Throughout the 1930s, '40s and '50s and beyond, the personnel records maintained by Lukens for each employee contained a space for "nationality"; white employees were listed as "American," black employees were listed as "colored" or "Negro". In 1969,

responsible Lukens officials issued orders for the correction of all personnel records by eliminating the offensive "nationality" designations; in a great many instances, this was accomplished merely by writing out the words "colored" or "Negro" with the result that, whereas white employees are listed as "American," many black employees are not accorded that designation.

In short, it is obvious from the evidence that, throughout the limitations period, any statistical racial analysis of the Lukens work force would be skewed because of earlier discrimination. That fact has placed each of the parties in a somewhat anomalous position. On the issue of intentional discrimination under §1981, and on the bona fides of the seniority system under Title VII, it is to plaintiffs' advantage to emphasize the pre-limitations discrimination, both for the purpose of showing that discriminatory animus tainted the establishment of the seniority system, and for the purpose of showing that discriminatory animus carried over into the limitations period. But that same evidence renders plaintiffs' statistical proofs applicable to the limitations periods much more difficult, since it tends to provide a non-actionable explanation for many of the observed disparities. Needless to say, Lukens' problem is the mirror-image of plaintiffs': explaining present-day disparities as attributable to past discriminatory practices tends to undermine the company's §1981 and seniority defenses. The union defendants, also, have been placed in the somewhat ambivalent position of minimizing the extent of earlier discrimination so as to bolster their contention that the seniority system was and is bona fide; for the most part, supporting the employer in its defense against claims being asserted by the unions' own members; and, at the same time, maintaining that all claims of racial discrimination were recognized and vigorously pursued.

Thus, it is not surprising that the evidentiary record as a whole reflects a good deal of legal tightrope-walking by all parties; and some seeming internal inconsistencies

in their respective positions. The question before the Court, however, is not whether one party or the other achieved a greater degree of success in solving its tactical and strategic problems, but what factual conclusions are correctly to be drawn from the mass of evidence presented.

In the following Findings of Fact addressing the merits of the various discrimination claims, matters as to which plaintiffs' proofs clearly fail to make out a prima facie case, and matters as to which there can be no substantial disagreement, will be set forth in summary form, without elaboration. As appropriate, particular findings or groups of findings will be accompanied by a discussion of the pertinent evidence, and the court's reasoning.

IV. THE BONA FIDE NATURE OF THE SENIORITY SYSTEM

34. The seniority system embodied in the series of collective bargaining agreements governing the relationships between Lukens and its employees since 1937 have had, and continue to have, the inevitable effect of perpetuating disparities and disadvantages associated with race.

35. When the seniority system was established, blacks at Lukens were being, and had been for many years, discriminated against. In comparison to white employees, blacks occupied the lowest-paying jobs, were segregated into specific units, did not have equal access to promotional and transfer opportunities, etc.

36. Both the unions and the company were fully aware of the discriminatory practices and disparate status based on race. And both the unions and the company were aware that the seniority provisions of the initial and subsequent collective bargaining agreements would tend to stabilize and perpetuate the existing racial disparities.

37. In instituting the seniority system, however, neither the unions nor the company was motivated by racial considerations. The system of unit-seniority was adopted because it represented standard practice throughout the steel industry, and was assumed to be best suited to operating efficiency. From the standpoint of the unions, the crucial first step and transcendent goal was to organize the workers and achieve recognition, and it was important to establish that this goal could be achieved with minimal alteration of the status quo. The company, too, sought to minimize change.

38. The 1962 modification of the seniority system through the establishment of the "pool" arrangement was not racially motivated. Moreover, the change did not disadvantage black employees; and blacks actively participated in the negotiations which led to the modification.

39. Pursuant to a 1974 Consent Decree in litigation brought by the Justice Department to remedy perceived racial discrimination in the steel industry, the major steel producers were required to, and did, implement plant-wide seniority. Although the labor negotiations of these major steel producers have been, and are, generally relied upon as establishing the pattern for the entire industry, no such change was implemented at Lukens. The International Union, while it announced the contents and ramifications of the Consent Decree in union publications available to the membership at large, made no concerted effort to discuss the Decree with the leaders of the local unions at Lukens, nor did it urge that plant-wide seniority should be adopted at Lukens pursuant to "pattern-bargaining". The company was not a defendant in the government litigation, and, so far as the record discloses, more or less ignored the implications of the Consent Decree.

It would be permissible to draw the inference that neither the company nor the local unions at Lukens were

sympathetic to the Consent Decree or to the 'governmental interference' which produced it. But whether the bargainers at Lukens be deemed enlightened or benighted, the evidence as a whole makes it clear beyond dispute (a) that a shift to company-wide or plant-wide seniority would be as likely to disadvantage blacks as to improve their lot; (b) among all Lukens employees, black and white alike, there is and has always been an overwhelming preference for the present seniority system, over a plant-wide system; (c) blacks participated actively in the negotiations leading to each of the pertinent collective bargaining agreements, and never suggested any such change in the seniority system; and (d) among the 50 or so witnesses who testified for the plaintiffs in this case, not one expressed any complaint about the seniority system.

40. Even if the seniority system at Lukens had been established for the express purpose of perpetuating racial disparities (which, as noted above, is not the case), a shift to plant-wide or some other seniority system would be unlikely to provide any net benefit to black employees, now or in the future.

V. RACIAL DISPARITIES ATTRIBUTABLE TO IMPACTS OF THE SENIORITY SYSTEM, AND THEREFORE NOT ACTIONABLE

41. The evidence establishes the following facts, but, because attributable to the impacts of a bona fide seniority system, these facts provide no basis for relief in this case, and the evidence in support of these facts has little or no probative value in this case:

(a) that white employees as a group receive higher hourly adjusted base wages than comparable black employees;

(b) that white employees receive higher overall annual earnings than comparable black employees;

(c) that white employees are in higher job classes than black employees of equal company service (both treating the hourly work force as a whole, and also treating craft and non-craft employees as separate groups);

(d) that white employees hold a disproportionately high percentage of craft jobs, compared to their representation in the non-craft hourly work force.

Plaintiffs have presented other evidence pertaining to racial disparities, unrelated to seniority and not shown to have been affected by the seniority system, which must now be considered.

VI. INITIAL JOB ASSIGNMENTS DURING THE LIMITATIONS PERIOD

A. *The Job-Class of Initial Positions*

42. White employees hired between January 1, 1972 and February 7, 1977, into non-craft jobs were initially assigned to positions with an average job class of 4.9. During the same period, blacks hired into non-craft jobs were initially assigned to positions with an average job class of 4.42. This difference of almost one-half a job class is statistically significant at the .01 level (more than five standard deviations from the result which would be expected in the absence of racial impact).

43. Hiring at Lukens is conducted on a weekly basis, and the choice of initial assignment necessarily reflects the particular openings available in a given week.

44. During the same January 1, 1972 to February 2, 1977 period, treating each week's hires separately, it appears that the median job class in most weeks was class 5. Indeed, during the entire period, more than half of white non-pool hires, and almost 70% of black non-pool hires, were assigned to positions in job class 5. The likelihood of a black new hire achieving initial placement

above job class 5 was much less than the likelihood of a white hire obtaining such a placement (more than six standard deviations less likely, a difference which is statistically significant to a high degree). (Lukens' table L-27.)

45. Another study, covering the years 1973-77, establishes that the initial placements of non-craft new hires into job classes, on average, was 5.0 for white males, 4.8 for white females, 4.7 for black males, and 4.2 for black females.

46. Reverting to table L-27, covering the period January 1, 1972 through February 2, 1977, it appears that there were 25 weeks in which the median job class of new hires was higher than class 5. More whites than blacks were hired in 18 of those weeks (72%).

B. *Initial Assignments to the Pool Versus Initial Assignments to Seniority Subdivisions*

47. There are three potential advantages which tend to make initial assignment to a seniority subdivision preferable to initial assignment to the pool:

(a) First, an employee initially assigned to a seniority subdivision begins to accumulate seniority in that subdivision, as well as company seniority. So long as he remains in that subdivision, he will always have rights to jobs in that subdivision which will be superior to the rights of other persons hired the same day but initially assigned to the pool. If he later transfers out of that subdivision, his accumulated seniority may enable him to bump back into that subdivision in the event of a layoff in his second subdivision. Thus, an employee initially assigned to a seniority subdivision gains added protection against layoffs.

(b) Second, in the event of layoff, a pool employee's job rights are subordinate to those of every

hourly employee with an earlier company service date. The job-rights of an employee in a seniority subdivision, however, are junior only to persons having more seniority in that subdivision. Thus, if a layoff does not hit that particular subdivision, the subdivision employees will continue to work even though other employees with greater company seniority are being laid off.

(c) Third, an employee in a seniority subdivision enjoys greater stability and certainty in work-assignment. Pool employees, on the other hand, are subject to being transferred from job to job on a daily, or even hourly, basis.

48. During the period January 1, 1972 through February 2, 1977, of persons described as "new hires" in Lukens' transaction reports, black employees had a 23.5% greater likelihood than whites of being assigned initially to the pool. 31.8% of black new hires were assigned to pool positions, compared to 24.2% of white new hires. This disparity is statistically significant to a high degree (at the .01 level).

Apparently, Lukens' records list as "new hires" many persons who were employed at Lukens previously, and are being re-hired; and Lukens contends that it is reasonable to assume that a person being re-hired is likely to be assigned to the same type of job previously held. I have some difficulty appreciating the significance of this argument, at least in the absence of a showing that such transactions affecting blacks were recorded or labeled differently from similar transactions involving whites; or that blacks are more likely to be re-hired than are whites. Moreover, there is reason to doubt the initial premise, namely, that jobs assignment on re-hire is likely to be similar to the job assignment on initial hire. A study by plaintiffs' statistical expert demonstrates that there is

no correlation between the job assignment on initial hiring and the job assignment on most recent re-hire (N.T. 31.86-87; U-461.)

Be that as it may, elimination of all "new hire" transactions which Lukens contends are repetitious (approximately 27% of the total "new hire" transactions reflected in Lukens' records) merely reduces the disparity between races, but does not neutralize it.

49. Considering only the "new hires" asserted by Lukens to be genuine "new hires," 26.3% of blacks were assigned to pool jobs, as compared with 21.6% of whites. This disparity is statistically significant (at the .02 level).

50. Analyzing repeat-hires separately produces the following: Of "second" hires, 44.3% of blacks and 30.3% of whites were assigned to pool positions. Of all repeat hires, 46.8% of blacks and 31.1% of whites were assigned to pool positions.

On their face, these percentages show statistically significant disparities to a high degree (at the .01 level). As independent evidence of discrimination, however, the importance of these "re-hire" figures is relatively slight. Employees in pool jobs are more likely to be laid off than employees in seniority units, hence (probably) more likely to experience repeated hirings. Blacks have always been over-represented in the pool. The "pool" jobs are those at the lowest end of the ladder. Absenteeism, voluntary quits, and adverse disciplinary actions — all of which tend to burden blacks more than whites, as will be discussed later — may contribute to the "re-hire" assignment disparities.

51. There is no statistically significant racial disparity in pool versus non-pool assignments among "new hires" for the 1969-1970 period (Lukens' table L-75). When all "new hires" regarded by Lukens as genuinely "new" hires, for the entire period from 1969 through 1977 are studied (*i.e.*, combining the data in Lukens' table L-75 with the data in Lukens' table L-76), it appears that 30.9% of blacks were assigned to pool positions (200

of a total of 646) while only 26% of whites were assigned to pool positions (355 of a total of 1,336). These disparities are statistically significant (below the .05 level).

52. Lukens contends, *inter alia*, that the foregoing statistics are irrelevant, and that the only relevant statistics are those which analyze the hiring process week-by-week. It is true that, in weeks during which both blacks and whites were hired, and one or more new hires were assigned to the pool, there was no significant racial disparity in pool assignments. I find this argument unpersuasive.

While Lukens does hire on a weekly cycle, and the initial job assignments reflect the kinds of openings available in a particular week, I am persuaded that the overall statistics provide a more reliable racial comparison than do the weekly statistics. Just which positions will be filled, and when, is entirely within the control of the company. Although theoretically job applications are kept on file in the employment office in chronological order so that applicants can be interviewed in chronological order for available openings, this is not a rigid rule, and is commonly departed from. The entire process, of deciding when various positions are to be filled, and who will fill them, involves many subjective judgments by managerial personnel.

Analysis of the overall statistics shows that blacks, to a statistically significant degree, are more likely than whites to be newly hired and initially placed in weeks in which large numbers are assigned to pool openings. The probability of this occurring by chance are about 3 in 10,000, more than 3 standard deviations (P-1390; N.T. 30.98-100).

There are, to be sure, data tending to negative discrimination in initial job assignments. Defendants properly point out that, in weeks in which no pool jobs were filled, a higher percentage of blacks than whites were hired; and that in weeks where no blacks were hired, a greater percentage of pool positions were filled than in

weeks in which blacks were hired. (Lukens' Exhibits L-1901 B and 1902A.) In my view, however, the overall statistics carry greater weight. Analysis of each hiring week separately is suspect because of the smaller numbers involved; such minute analyses may often be meaningless. Moreover, plaintiffs are not required to prove that discrimination occurred every week, or that the employer invariably discriminated.

53. Lukens has also attempted to refute the foregoing statistics on the theory that gender differences (not actionable here) rather than racial differences, are reflected in the data. Lukens personnel involved in the hiring process testified that, based on their observations, women seeking employment at Lukens tend to prefer pool assignments, because such jobs are less demanding, tend to fit in better with the flexible schedules desired by housewives with families to care for, and are better suited to the needs of persons whose primary careers are in the home.

One such witness was George P. Kissell, Jr. However, during the time he was in charge of the placement of hourly employees (February 1974 through July 1976) a higher percentage of male applicants were assigned to pool positions (19.1% of male new hires) than female (18.7% of female new hires) (L-25, 26). No detailed statistics were presented covering the period when Trinka Fleming, the other witness who noted the alleged preference of females for pool assignments, was in charge of the process. During the entire period of Kissell's and Fleming's tenure, only 43 females were newly hired to non-craft positions.

During the period from July 19, 1973 through February 23, 1974, according to an internal report prepared by Lukens' record administrator, Carl Welsh, among female "new hires" 48% of the blacks were assigned to pool positions, as compared with only 27% of the whites.

At trial, Lukens presented other statistics (allegedly reflecting elimination of repeat hires), showing that,

among female new hires, 39% of the blacks were assigned to pool positions, as compared with 24% of the whites.

Even assuming (contrary to the plain implications of Lukens' records) that the alleged preference among women for pool assignments did exist, it does not explain the racial disparities, either in the aggregate, or among male new hires, or among female new hires. That is, there is no suggestion that the alleged preference for pool jobs was more prevelant among black females than white females.

C. *Access to Better-Paying Hourly (Craft) Positions*

54. As noted above, blacks are significantly underrepresented in craft jobs at Lukens. But since this is, in substantial part at least, attributable to pre-limitations activity and the impact of the bona fide seniority system, the gross statistics (percentages in various categories, wage and earnings levels, etc.) are not particularly helpful. There is, however, other evidence which bears directly on the issue of whether or not, during the limitations period, blacks were discriminated against in respect of the accessibility of craft jobs.

55. Of the employees first hired at Lukens, into non-craft positions, between January 1, 1972 and February 2, 1977, 4.8% of the black hires had been promoted into craft positions by February 2, 1977, whereas 14.9% of the white new hires had been promoted to craft positions within that period. Thus, whites employed during that period were more than three times as likely as blacks to be promoted into craft positions.

56. During the same period, 34.4% of all "new hires" were black, whereas only 14.5% of those new hires who were promoted to craft positions were black (this represents about 6.62 standard deviations from the random).

57. The foregoing findings are applicable, whether "craft positions" are defined pursuant to the pre-1971 "industry" definition, or the post-1971 "EEO" definition.

58. As demonstrated in P-501, p. 2, P-502, table 3, and as testified (N.T. 4.12-14), although company seniority has a bearing on eligibility for promotion to craft positions, seniority does not account for the disparities mentioned above. A comparison of all hourly employees actively employed at Lukens as of February 2, 1977, by year of hire, shows that, in 33 of the 34 years studied, blacks hired during that year were, to a statistically significant degree, less likely to have achieved craft status by February 2, 1977 than their white counterparts. Indeed, the defendants concede that the racial disparities in craft positions are not accounted for by seniority.

59. Since 1962, the collective bargaining agreements have mandated that, where ability and physical fitness are substantially equal, transfers to better jobs are governed entirely by company seniority. However, the "request for transfer" system which was in operation until August 1971, and, to a lesser extent, the "posting" system which has pertained since that date, were susceptible to abuse on racial grounds. As noted previously, until the 1971 job-posting program was instituted, the existence of openings in craft positions was likely to become known only to a few persons, who could then selectively impart that information to their friends and relatives. While precise statistical or documentary evidence is not available on this subject, the evidence as a whole leaves little doubt that, before August 1971, blacks were much less likely to learn of the availability of craft openings than their white counterparts.

Moreover, actual approval of job-transfer requests involved a great many subjective judgments on the part of supervisors. Until 1971, the supervisor of the subdivision into which transfer was sought had absolute and unfettered discretion to approve or reject a transfer application. Until August 1971, a transfer request could,

and usually was, "voided" in the employment office (*i.e.*, was not even submitted to the supervisor of the subdivision in question) if the employee seeking transfer had not maintained a "clean" disciplinary record for the previous three years. Absenteeism, as such, was disregarded, unless the employee had been disciplined for absenteeism. As discussed below, blacks were much more likely to be disciplined for absenteeism (and in general) than their white counterparts.

60. At least during the pre-limitations period, there were numerous instances in which transfer requests were denied expressly because of racial considerations. There is no evidence of any specific instances of overt racial discrimination in the transfer process during the Title VII limitations period, and only a few such instances during the §1981 limitations period were testified to (these will be considered in connection with the individual claims of named or intervening plaintiffs).

On the other hand, some of the same individuals who had been guilty of overt discrimination during the pre-limitations period continued to have and exercise decision-making authority during the limitations period. That fact, coupled with Lukens' unremitting contention that there has never been any racial discrimination at Lukens, lends some support to the inference that the job-transfer system may have been manipulated, during the limitations period, to achieve racial discrimination in access to craft positions.

D. *Manning New Facilities; Strand-Casting*

61. In 1969, Lukens decided to construct a Strand-Cast facility. Strand-casting was then a relatively new process, in which molten metal is poured directly into a cast slab (rather than into molded ingots which are thereafter converted into slabs). It was contemplated that this new process would largely replace the work

then being performed in the open hearth pits, hot top, and conditioning steel yard subdivisions.

62. The applicable collective bargaining agreements provided that employees displaced from "any facility being replaced" by a new facility were to be given preference for entry into the new facility, in the order of their company seniority (union Exhibit U-481A).

63. The subdivisions most directly and drastically affected by the introduction of the strand-casting process were the pits, hot top, and conditioning steel yards. Seventy-percent of the hourly employees in those subdivisions were black. Plaintiffs contend that employees in those units should have been given precedence in manning the new facility and that, if this course had been followed, the new strand-casting seniority unit should have been approximately 70% black.

The company, however, determined that several other seniority subdivisions would have their manpower requirements reduced as a result of the new facility. These included the melting floor, cranes, 140/206 heating, 206 rolling, 206 floor and stock yard units; membership in most of these units was predominately white. Accordingly, the company interpreted the collective bargaining agreement as requiring it to accord priority to employees in all of the units mentioned above, in the staffing of the new Strand-Casting Unit.

There were 720 employees potentially eligible for assignment to the new Strand-Cast Unit, as determined pursuant to the company's interpretation of the collective bargaining agreement. Of these, 106 completed the application process. Thirty-one were ultimately selected; of these, 14 (47%) were black. Eight of the 14 blacks selected (60%) came from units other than pits, hot top and steel yards (Lukens Exhs. L-955, L-956).

64. While there is much force to plaintiffs' argument that, since the disproportionately black units were most drastically and directly affected by the implementation of the new manufacturing process, employees in

those units were entitled to the lion's share of the new jobs in Strand-Casting, the company's interpretation of the collective bargaining agreement is not manifestly unreasonable.

Because of the newness of the strand-casting method, the high cost of the equipment used in that process, and the potentially disastrous effects of employee error in conducting the operations, Lukens was understandably interested, to an unusual degree, in assigning the best-qualified persons to the new unit. While I recognize the distinct possibility that the decision-makers may have been influenced by racial stereotyping, unconsciously or otherwise, in deciding to open the application process to units less directly affected by the new facility, and while that possibility is obviously a disturbing one, I am unable to conclude that the evidence preponderates in favor of a finding of racial animus in this situation. That a genuine business judgment was made cannot be doubted; and, while this business judgment may have been clouded by racial preconceptions, I cannot find, from the evidence, that this is more likely true than not. It must be remembered that 47% of the persons assigned to the new unit were black, and that more than half of those blacks came from units which, according to plaintiffs' argument, were improperly included in the opportunity because predominately white.

65. Persons assigned to the Strand-Cast Unit were selected on the basis of company seniority and their ratings by supervisors, on a form known as the Personnel Description Check List ("PDCL"). The PDCL ratings were entirely subjective; most of the raters were white; and, when studied later (in 1972), the PDCL proved to have had a statistically significant adverse impact upon blacks.

66. Named plaintiff Ramon Middleton was initially rejected for the Strand-Cast Unit, solely because of his PDCL rating, which had been performed by a supervisor named Matthews. According to Matthews, who is white,

only two persons evaluated by him were given unsatisfactory ratings on the PDCL; they were Middleton, who is black, and George Eachus, who is white. This testimony lends significant support to plaintiffs contention that Middleton was discriminated against. The employment records of the two men show that Middleton's disciplinary record, over a 14-year period, consisted of 2 warnings, the most recent of which occurred in 1967. Eachus, on the other hand, had been twice suspended and had received four warnings, all between December 1969 and April 1971 (Exh. P-1421).

67. Four of the selected employees began training for the Strand-Cast Unit on July 20, 1970, 12 more began training on August 3, 1970, and eight more were added to the training program as of January 4, 1971. Middleton was less senior than the selectees in the first two groups, but the group which began training in January 1971 included two employees who had less company seniority than Middleton. It was then that Middleton learned, for the first time, that he had been rejected.

As a result of Middleton's protest, the union filed a grievance on behalf of Middleton and other rejected applicants, challenging the procedures for selection, including specifically the PDCL. Eventually the company and the union, with the approval of the affected employees, worked out a compromise solution pursuant to which specified employees, including Middleton, were to be given "special consideration" for assignment to the Strand-Cast Unit. This arrangeament was agreed upon as of February 3, 1971. On March 9, 1971, with the cooperation of the union representative, Middleton filed a complaint against the company with the Pennsylvania Human Relations Commission.

On April 5, 1971, eight additional employees were added to the Strand-Cast Unit, Middleton among them.

The net result of this series of events is that Ramon Middleton, by virtue of a foreman's evaluation which probably was tainted by racial bias, was not assigned to

the Strand-Cast Unit as early as he should have been. He is, I believe, entitled to adjustment of his seniority in that unit.

68. The most important job in the Strand-Cast Unit—indeed, it is the highest hourly job in the entire plant—is that of "No. 1 operator". The company decided that persons to be trained for the "No. 1 operator" position should, as a prerequisite, have at least two years "hot metal" experience, and specified the various jobs throughout the plant which, in the company's view, provided such experience. The "hot metal" requirement, as thus limited, excluded a disproportionately high number of blacks from consideration for the No. 1 operator job.

In retrospect, it seems quite probable that experience in several other jobs, in addition to those specified by Lukens, would have rendered an employee fully as well qualified for the No. 1 operator job as the experience mandated by Lukens, but that is not a judgment for this court, or the plaintiffs, to make. There can be no doubt that, in establishing these criteria, Lukens' officials were making honest business judgments. I am satisfied that racial considerations did not enter into the selection of these criteria.

At any rate, it is conceded that, if the "hot metals" experience requirement had been deleted, and the selections based entirely upon seniority, the four positions would have gone to whites anyway.

By the time of trial, one of the four top jobs in the Strand-Cast Subdivision was held by a black, and other blacks were being trained for the position. Viewed in its entirety, the evidence does not establish that there was racial discrimination in promotions to the "No. 1 operator" positions.

E. *Lukens' Explanation and Refutation; Superior Qualifications and personal choice*

69. As noted above, most craft positions at Lukens involve skills which must be learned during employment at Lukens. With limited exceptions, the principal requirements for promotion to a craft job are: physical ability to handle the job, amenability to instruction, and a desire to attain that position. Given those pre-requisites, company seniority is determinative.

70. Lukens challenges the probative force the statistical disparities discussed above on the ground that the statistical evidence does not address two important factors: personal choice, and relative qualifications.

71. While there may be, and undoubtedly are, isolated instances in which an eligible employee chooses to reject an offered promotion, or chooses not to apply for a better job, for personal reasons, there is no evidence, and I am unwilling to assume, that blacks are less interested in advancement than their white counterparts. It is, I believe, a safe generalization that most persons are interested in advancing their own economic welfare whenever the opportunity presents itself. I therefore reject the suggestion that personal choice contributes significantly to an explanation of the racial disparities disclosed by the statistical evidence. Moreover, it should be noted that if one were to conclude that a significantly greater percentage of blacks than whites choose not to improve their lot and that this phenomenon occurred on a sufficient scale to affect the interpretation of the statistical evidence, one might well then be faced with addressing the possible causes of such a phenomenon. If, for example, blacks tended to refuse promotion because of a sense, derived from the atmosphere of the work place, that they would not be welcome in the new position, or would be expected to "prove themselves" and overcome skepticism, or would thus become vulnerable to additional forms of discrimination, the alleged personal choice phenomenon

would scarcely constitute a valid explanation of the statistical evidence.

72. There is no evidence that, among persons initially hired at Lukens, blacks as a group were less qualified than whites for advancement to craft positions or to salaried positions.

73. To the extent that Lukens relies upon evidence concerning the under-representation of blacks among skilled craftsmen in the local outside labor market, the reliance is misplaced. Lukens was hiring persons capable of developing required skills, not persons who already possessed such skills. There is no evidence that, among persons actually hired at Lukens, whites tended to possess relevant skills to a greater degree than blacks.

74. The evidence concerning employee-testing programs at Lukens, detailed below, strongly supports plaintiffs' claims of discriminatory treatment.

(a) Until at least 1971, Lukens relied heavily upon the Wonderlic Test as a device for determining eligibility for advancement to craft positions, and to higher job classifications. In order to be eligible for advancement to a craft job, an employee was required to achieve a certain grade on the Wonderlic Test. In general, higher scores were required for each advancement to a higher job classification.

(b) It has been generally known since the late 1940s, and was in fact known to the pertinent officials at Lukens, that the Wonderlic Test is a measure of formal education, rather than of intelligence.

(c) As early as 1952, Lukens officials were aware, not only that the Wonderlic Test tended to measure formal education rather than intelligence, but also that the test was not job-related; indeed,

that there tended to be a negative correlation between scores on the Wonderlic Test and actual job performance, as measured by supervisors' ratings (Ex. P-8).

(d) In 1964, a Lukens official, James Hall, conducted a study to determine whether there was any relationship between Wonderlic Test scores and job-performance in the Lukens crane-operator training program. The study demonstrated that the Wonderlic Test was useless as a predictor of success as a crane-operator. The study even produced some evidence of an inverse relationship between test scores and job performance.

(e) On October 16, 1967, an employee of the Lukens Employment Department sent a memorandum to James Hall advising that, pursuant to federal and state testing guidelines, it was necessary that each item on the Wonderlic Test be compared to specific job content. No action was taken in response.

(f) The same memorandum also suggested the desirability of a validation study of the Wonderlic cutoff scores. So far as the record discloses, no such study was made.

(g) In 1968, Mr. Hall, because of his realization that the Wonderlic Test tended to have an adverse impact upon minority employees, directed that a study be conducted in an attempt to measure the relationship between Wonderlic scores and five selected criteria of successful job performance. The study was completed in August 1968, and established that the Wonderlic was "extremely poor" in predicting job performance (Exs. P-27, 28).

(h) At least by June 1967, it was generally known among Lukens officials that the Wonderlic Test had an adverse impact upon blacks, and that its

use was a major reason for the observed concentration of blacks in the lower job classifications at Lukens.

(i) Some Lukens witnesses testified that Lukens stopped using the Wonderlic Test as a screening device at or about the time the Supreme Court rendered its decision in *Griggs v. Duke Power Co.*, in March 1971. However, other Lukens witnesses testified that the abandonment of the Wonderlic Test for screening purposes occurred at the same time with respect to all positions, and it appears that the Wonderlic Test was being used for screening applicants for the position of foreman as late as July 1974. No written directive concerning abandonment of the Wonderlic device appears ever to have been issued.

(j) In July 1971, a directive was issued (by Mr. Domangue) to the effect that all tests currently in use at Lukens would continue to be used until a superior substitute had been developed, validated and instituted. To date, no testing procedure or screening device employed by Lukens has been validated.

(k) Some Lukens witnesses testified that, at some point between 1968 and 1971, Lukens began using the SRA Non-Verbal Test in place of the Wonderlic, on the theory that this would overcome the racially disparate impact of the Wonderlic test. However, the Lukens employees who actually administered such tests testified that the SRA Non-Verbal Test was rarely used, and that its use decreased between 1968 and 1971.

(*l*) Although Lukens stopped administering the Wonderlic Test (probably some time in 1971), Wonderlic Test scores continued to be shown under "qualifications" on job transfer forms after that date.

(m) In 1972, Lukens developed a test known as the "Shop Math Test" which it required for entry into electrical craft positions. By 1974, the Shop Math Test was also required for entry into the Mechanical Maintenance Subdivision, and at some point thereafter it became a requirement for entry into virtually all of Lukens' trade and craft subdivisions (P-43, P-49).

(n) The Shop Math Test was frequently revised, and it is impossible to determine which version may have been employed at particular times.

(*o*) Lukens presented data suggesting that, between 1974 and September 22, 1978, the Shop Math Test was administered to 479 white employees and 93 minority employees. Sixty percent of the whites passed, compared with twenty-nine percent of the blacks. These figures lead inescapably to the conclusion that the Shop Math Test was a substantial factor in producing the racially disparate rate of transfers from non-craft to craft jobs discussed above.

(p) Neither the Shop Math Test, nor any other screening device was employed at any time at Lukens, has ever been validated as job-related. As is demonstrated by a series of internal memoranda from 1968 through 1979, responsible officials at Lukens were well aware that the various testing and screening devices had a disparate impact upon blacks, that they had not bee validated as job-related, and that, in the absence of validation, their continued use was highly questionable.

(q) At the time of trial, Lukens purportedly was engaged in an attempt to validate the Shop Math Test, for content-validity.

(r) Throughout the period when the Wonderlic Test was in widespread use at Lukens, Lukens officials constantly defended the practice as being validly job-related, despite the fact that their own studies had shown the contrary. In the course of collective bargaining negotiations in 1968, when the union challenged the continued use of the Wonderlic Test, company representatives dismissed the challenge as being asserted merely on behalf of "minorities".

(s) Lukens did not preserve records of tests administered, or test scores in any systematic way. There is therefore no adequate basis for statistical studies demonstrating that particular tests did adversely affect racial minorities. On the other hand, it is reasonably clear that the Lukens personnel administering the Shop Math Test believed, on the basis of their observations, that the Shop Math Test did adversely affect minorities.

75. There is no evidence to suggest that there was any dissimilarity between the tests required of white applicants and the tests required of black applicants for promotion/transfer.

F. *Shift Assignments, Incentive Bonuses, Overtime Pay*

76. Plaintiffs presented a great deal of anecdotal evidence tending to show that many foremen and supervisors discriminate between races in assignments to particular work, overtime work, less desirable shifts, etc. There can be no doubt that many individual instances of discriminatory treatment have been shown. Considered as a whole, however, the evidence in this case is inconclusive with respect to plaintiffs' assertions that, customarily and on a class-wide basis, blacks were discriminated against with respect to shift assignments, Sunday work, and overtime pay. The statistical evidence

tends to show that, on average, blacks at Lukens receive more overtime pay and incentive bonus compensation than their white counterparts. This may well be due to the fact (as asserted by plaintiffs) that blacks are more likely to be assigned to work on Sundays than are whites. Plaintiffs may be correct in arguing that most employees would prefer not to work on Sundays, hence assignment to Sunday work is a disadvantage. On the other hand, the defendants may well be correct in arguing that Sunday work, which produces higher pay than work during the week, is a much-desired benefit. The record provides no basis for choosing between these two interpretations.

77. There is, however, substantial support in the evidence for plaintiffs' charge that there was racial discrimination in the denial of an incentive-pay plan for workers in the open hearth pits.

When the open hearth furnances were in operation (the changeover to electrical furnaces was completed at about the time this lawsuit was filed), two different seniority subdivisions were involved in the process. Workers in the melting floor (the "floor" workers) placed the raw materials into the furnaces for melting and supervised the melting process. These workers were physically located at a higher level than the pit workers. The pit workers prepared the molds to receive the molten metal, poured the molten metal into the molds, and removed the molds after the metal had hardened. The "floor" subdivision was historically predominately white; the "pit" subdivision was historically all black (even by 1978, it was 95% black).

As can be readily perceived, the quantity and quality of work produced in operating the open hearths was a measure of the performance of both seniority units, neither of which could function without the other, nor at a different rate than the other. Nevertheless, Lukens had an incentive-bonus plan for the floor workers, but not for the pit workers.

This differential was a source of great pride and amusement for the floor workers. There was testimony about incidents in which the floor workers would wave their pay checks at the pit workers below, and brag that their incentive pay was greater than the pit workers' total pay.

After many years of complaint and struggle, the pit workers, through the union, sought to obtain an incentive pay program for their unit. The company eventually agreed to provide an incentive pay arrangement for the pit workers, but only if they would give up a previously negotiated agreement concerning crew size in the pit unit. The pit workers were unwilling to yield on the crew-size issue, and no incentive pay plan was ever agreed upon. There were incentive-compensation plans for other units which had crew-size agreements as well, or at least informal arrangements concerning crew size which were observed by both sides.

78. At no time did the collective bargaining agreement provide for incentive-pay in the open hearth pit subdivision. The union sought to negotiate such an arrangement, but, as stated above, was ultimately unsuccessful. Given the fact that the company paid incentive bonuses to the "floor" personnel, however, the company's refusal to accord the same benefit to the pit personnel had no legitimate justification. I find that this was a clear instance of racial discrimination.

79. In matters of shift-differentials, overtime-pay and work assignments, minority employees at Lukens had no greater entitlement than white employees, namely, the entitlements required by the collective bargaining agreements. Any employee whose rights under the collective bargaining agreement may have been violated had the right to press a grievance; and the record leaves no doubt that the grievance mechanism was frequently and widely utilized. Unless there was racial imbalance or unequal treatment in the grievance proceedings, therefore (a topic which will be discussed later in this Opinion), it is reasonable to conclude that the individual claims of discrimination in these respects have been satisfactorily and properly resolved in the grievance proceedings. That is, such proceedings presumably remedied actual departures from collective bargaining agreement entitlements; and if no such departure was established in that proceeding, the probability is that there was no disparate treatment calling for a remedy in this litigation.

While the sheer volume of alleged individual incidents is somewhat disturbing, the fact remains that a great many of the alleged instances seem indistinguishable from the normal gripes which arise and irregularities which occur in any workforce regulated by collective bargaining. It is reasonable to suppose that a great many white employees, too, complained about shift-differentials, work assignments, and overtime compensation. As will be discussed below, analysis of the grievances which were filed during this period suggests that grievances were pursued on behalf of black employees at a rate approximately equal to their representation in the hourly work force. If roughly one-third of all grievances were pressed on behalf of blacks, as the evidence suggests, it would be reasonable to conlcude that blacks and whites perceived violations of the collective bargaining agreement in these respects in approximately proportionate numbers.

For these reasons, I conclude that the evidence in this case provides no basis for granting class-wide relief with respect to matters of scheduling, shift-differentials or overtime compensation.

G. *Discrimination in Discipline*

80. Whether perceived infractions would be noted in the employee's personnel file, whether discipline

should be imposed, and the nature and extent of disciplinary action, were all matters primarily within the subjective discretion of individual foremen and supervisors. Most of the persons with decision-making authority in disciplinary matters were white.

81. An employee who left work before the end of his shift, and before his replacement had arrived, was subject to being logged for "early quit". An employee who arrived late was subject to being logged for "late start", and might (particularly if other arrangements had been made in the interim) be sent home, in which case he would be recorded as "absent". And, of course, an employee who failed to report for work, without having telephoned in advance or otherwise reported his unavailability sufficiently in advance of the scheduled starting time, would also be recorded as "absent".

82. Considered in its entirety, the evidence convinces me that a large number of foremen treated their white employees more leniently in these respects than they treated their black employees. This is not to say that blacks were logged for infractions of which they were not guilty. Although there may have been isolated and rare instances of totally unsupported disciplinary charges against blacks, I conclude that disciplinary charges actually logged ar[illegible] recorded against blacks should be regarded as establishing that the violation did in fact occur. Rather, my conclusion is that white employees in virtually identical circumstances were much less likely to have disciplinary charges brought or recorded against them.

I find it impossible to quantify this differential, but believe it appropriate to keep that differential in mind in analyzing the statistical evidence presented.

83. Black employees made up approximately 33% of the non-craft hourly work force during the period from September 25, 1972, to February 2, 1977. During that period, 56% of all non-craft employees discharged "for

cause" were black (approximately 11.4 standard deviations above what would be expected if the discharge process had an equal probability of affecting blacks and whites).

84. Of the 403 total discharges during the above period, 348 occurred in the first three months of employment. The percentage of black employees discharged during their first three months of employment (56%) exceeded the percentage of new hires who were black (34.4%) by 8.5 standard deviations.

Without more, of course, these figures prove very little. That is, they show either that blacks were unsatisfactory employees, or that they were judged more harshly than whites; but it is impossible to tell which is the correct inference.

85. I accept as essentially correct Lukens' contention that there was in fact a valid reason for discharging every person who was discharged. But if the same "reason" relied upon to discharge a black employee did not result in the discharge of a white employee providing the same "reason," an inference of racial discrimination is plainly justified. Accordingly, it is important to try to achieve a comparison between the treatment accorded similarly situated blacks and whites.

86. Lukens maintained personnel records of every employee discharged for cause, containing notations as to the cause for discharge. In many instances, there is also available some further record, such as the minutes of a grievance committee meeting, which sheds light on the basis for the discharge decision.

87. In a very large percentage of discharge cases, excessive absenteeism was noted as a cause, or one of the causes, for the discharge.

88. Both sides have presented statistical studies attempting to determine whether blacks were more likely to be discharged than whites with similar disciplinary records for absenteeism. Plaintiffs' studies were based upon the personnel and other records supplied by

Lukens. After plaintiffs' study (which showed significant racial discrimination) was prepared, Lukens conducted further studies which suggested that, in many instances, the "reason" set forth in the personnel records ("absenteeism") was not correctly reported, thus undermining the validity of plaintiffs' studies.

While I remain persuaded, as I stated in the course of the trial, that plaintiffs should be entitled to rely upon Lukens' own records in this respect, I nevertheless recognize that it is often difficult to determine precisely what the real reason for a discharge decision may have been (absenteeism, plus some other relatively minor infraction which proved to be the last straw, or a fairly serious infraction coupled with an unsatisfactory record of attendance).

It does seem reasonable, in this context, to conclude that if absenteeism was expressly noted on Lukens' records as the cause or a principal cause for the discharge, the employee probably would not have been discharged if his attendance record had been better.

Moreover, Lukens contends that absenteeism, to some extent, was a factor in virtually all discharge decisions.

Accordingly, it is important to try to compare the absenteeism records of blacks and whites discharged for absenteeism, and the absenteeism records of all blacks and whites discharged for cause, as well as the absenteeism records of employees who were not discharged.

89. In my view, a very significant bit of evidence is plaintiffs' Exhibit P-1399A, a study which demonstrates that blacks were much more likely to be discharged for absenteeism than whites, unless the absenteeism rate exceeded 30%. Stated otherwise, among employees with the same percentage of absenteeism on their records, blacks were much more likely to be discharged for absenteeism than were whites.

90. Accepting as correct Lukens' contention that some of the "reasons" for discharge were erroneously reported or interpreted, and accepting Lukens' interpretations as the correct ones, does not substantially affect the probative force of Exhibit P-1399A.

91. The data reflected in Exhibit P-1399A include all discharges, irrespective of whether the discharge occurred during the probationary period or thereafter. In the circumstances of this case, the failure to analyze probationary and non-probationary discharges separately does not weaken the probative force of the exhibit nor the conclusions flowing therefrom, namely, that, unless a worker is absent more than one-third of the time, he or she is much more likely to be discharged for absenteeism if black than if white.

Lukens' own evidence (L-2414, 2416) establishes that, among persons discharged during the probationary period, blacks had better attendance records than whites. Moreover, the percentage of blacks discharged during the probationary period for reasons other than absenteeism (*i.e.*, where absenteeism is not mentioned as a cause) was higher than the percentage of blacks among discharges related to absenteeism.

92. As noted above, there is necessarily some lack of precision in assigning "reasons" for discharge decisions. Indeed, it is probable that quite a few errors crept into the Lukens records; many persons initially listed as having been "discharged" might, with equal accuracy, have been described as "voluntary quit". Lunkens' original records (*i.e.*, those kept contemporaneously, in the normal course of business) showed 414 employees as having been "discharged for cause" between April 16, 1971 and February 2, 1977 (L-2415). Lukens' witnesses testified at trial, however, that only 341 of those persons were actually discharged. While Lukens' post-trial submissions are not entirely clear on this point, Lukens may be contending that the correct total of persons actually discharged during that period is 326. Accepting Lukens'

reclassifications does not change the analysis materially, since very few of the persons reclassified were originally listed as having been discharged for absenteeism.

Among persons indisputably discharged, there are perhaps 15 or 20 instances in which plaintiffs' classification of the "reason" is questionable—*i.e.*, neither clearly correct nor clearly incorrect. I am not persuaded that these discrepancies and uncertainties materially undermine plaintiffs' proofs.

93. Because of its importance in Lukens' overall defense of plaintiffs' charges, this issue of absenteeism merits further discussion.

Lukens has produced impressive evidence that clearly establishes the following:

a. Absenteeism is a serious problem at Lukens.

b. Viewing the work force as a whole, blacks have much higher absenteeism rates than whites.

c. Controlling for job-level reduces the differential of absenteeism between races, but it remains statistically significant at all levels.

d. Discharged employees have much worse absenteeism records than employees who are not discharged.

Thus, Lukens argues, with considerable force, that it is at least a 99% probability that absenteeism alone explains the racial disparities in discharge decisions.

Plaintiffs counter with statistical studies which demonstrate that job-class itself is a much greater factor in absenteeism than is race (*i.e.*, job class "explains" absenteeism at least three times as well as race). It is not clear to me that this evidence provides much help to either side. If, as the evidence as a whole clearly establishes, blacks are over-represented in the "worst" jobs, where absenteeism is greatest among workers of all races, it would seem that the choice between race and

job class as the better predictor of absenteeism would depend merely upon the magnitude of the over-representation of blacks in the job classes prone to absenteeism. And, since the over-representation of blacks in the "worst" jobs is largely traceable to pre-limitations discrimination, perpetuated by a bona fide seniority system, the utility of job-class as a predictor of absenteeism is, for purposes of this litigation, severly undermined. That is, to the extent that blacks in each job classification have worse attendance records than whites in the same job classifications, that differential may properly be taken into account by Lukens in its disciplinary decisions, even though black disillusionment and frustration, and dissatisfaction with delayed advancement, may have produced the higher rate of absenteeism among blacks.

94. While the lingering effects of prelimitations discrimination, perpetuated by the seniority system, cannot be taken into account to justify racial differentials in absenteeism, there is still the question whether such justification may properly be attributed to ongoing discriminatory practices. The crux of the absenteeism controversy can be stated as follows: Are blacks at Lukens more subject to discipline because they are less likely to attend, or are they less likely to attend because they are being discriminated against, or both?

Plaintiffs argue, with the support of impressive expert testimony from Dr. Kenneth Clark, that past discriminatory practices at Lukens, coupled with a reasonable perception that discrimination is still likely to be encountered in the work place, presents a serious obstacle to the attainment by blacks of good attendance records. I have no doubt that there are many psychological and emotional barriers which represent significant disincentives to upward mobility on the part of persons who still bear the scars of historic discrimination against members of their race.

The fact remains, however, that the issue in this case is not what vestigial burdens of guilt are properly assignable to society as whole, but the legal liability of Lukens Steel Company. Under the law, Lukens is required to provide equality of opportunity; but it is not legally liable for failing to intrude upon the private lives of its black employees in an effort to induce them to avail themselves of opportunity. That is, unless Lukens is properly chargeable with tolerating a discriminatory environment, it has the undoubted legal right to insist that all employees, black or white, show up for work when they are supposed to, and complete their shifts as required. Mis-perceptions of the working environment, however subjectively reasonable, cannot form the basis for imposing legal liability upon a private employer. In a perfect world, the rule might well be otherwise. Greater sensitivity on the part of employers to the needs, problems, and perceptions of their employees is undoubtedly a worthy societal goal. But the law does not require perfection, and this court is not free to impose legal liability for failure to attain it.

To the extent, therefore, that differences in absenteeism explain racial differentials in disciplinary decisions, plaintiffs have no cause for complaint in this case.

95. It is difficult to draw firm conclusions about the discharges of non-probationary employees. At least since the present system of progressive discipline was instituted, pursuant to collective bargaining, in 1974, it is probable that the grievance procedures have adequately protected blacks covered by the collective bargaining agreement from discrimination in discharges. Most of the alleged discrimination is attributable to discharges during the probationary period.

96. In 1973 and 1974, Lukens sharply increased its work force. The "bulge" of hirings (and firings) during this period provide most of the raw data for the 1971-77 statistical studies mentioned above.

97. Lukens has presented studies (L-3019, 3020) purporting to show that blacks hired in 1973 had absentee rates in that year of 22.4%, compared to a rate of 15.14% for whites; and that for 1974 hires, the rate was 14.9% for blacks and 7.98% for whites. Lukens has also presented evidence to the effect that persons hired in each of those years, who were discharged by March 1 of the following year, had much higher absenteeism rates than person who were not discharged (1973: 23.94% versus 13.99%; 1974: 12.96% versus 9.27%).

From these studies, Lukens argues that absenteeism in the first year is obviously (99% probability) related to prompt discharge, hence the greater absenteeism among blacks is a non-discriminatory explanation for the gross disparity in black discharges.

While the basic premise of these arguments is plainly correct — persons who are absent a lot when first hired are less likely to survive the probationary period than persons who have good attendance records — the analysis has serious flaws. The black-white comparison ("absentee rates in year of hire") is meaningless, since it lumps together persons hired at the end of the year, whose "absentee rates" would be derived from inadequate data, and persons hired earlier in the year. That is, a person hired in mid-December who missed one day's work is counted the same as a person hired in March who missed 45. Whether this defect adversely affects blacks or whites is impossible to tell; the point is, it makes the entire study unreliable.

Less serious in this context, but nonetheless interesting in view of its inconsistency with a major premise of Lukens' argument elsewhere — that probationary and non-probationary discharges must be considered separately — is the fact that both of these studies to some extent lump together probationary and non-probationary employees.

But the most telling point here is what these studies do *not* address, namely, the absenteeism rates of persons

who were discharged. The contention that racial differentials in absenteeism account for racial disparities in discharges simply cannot be accepted in the face of uncontradicted evidence that the discharged blacks had better attendance records than the discharged whites.

98. Lukens concedes that the statistical evidence on discharges would justify an inference of racial discrimination, and that the evidence as a whole is consistent with that inference (*i.e.*, does not refute it). Lukens argues, however, that the plaintiffs must go further, and provide specific evidence of erroneous discharges of blacks. That is, unless plaintiffs can show that certain blacks were discharged for no valid reason, they cannot prevail on this issue.

I reject that contention. The issue is whether there is a valid explanation for the fact that Lukens' evaluations of employee-performance during the probationary period so significantly favored whites. Both blacks and whites were deemed suitable for hiring initially. The probationary evaluations are largely subjective, and performed largely by whites. The criteria, physical health and willingness to learn, are not difficult to achieve. Absenteeism is not the explanation. What is?

99. A significant clue is provided, strangely enough, in Lukens' proposed finding of fact No. 410:

> "It is also undisputed in the record that virtually all discharges took place in 1973 and 1974, a period in which Lukens, for EEO and affirmative action reasons, did no pre-employment testing."

Upon careful reflection, I find this assertion remarkable, and highly significant. It seems to suggest that, if left to its own devices, Lukens would have preferred not to hire so many blacks in the first place. Since "EEO and affirmative action reasons" (so as to remain eligible for lucrative government contracts) ruled out that choice,

Lukens simply achieved its objective by means of its relatively unfettered discretionary decisions during the probationary period.

Viewed in its harshest light, this amounts to overt racial discrimination. Viewed more charitably, and probably more accurately, it would seem that preconceived racial assumptions on the part of Lukens' personnel in positions of authority caused them, without evil intent, to evaluate black performance more harshly than white.

100. I conclude that plaintiffs have established that those members of the plaintiff class who were discharged during their probationary periods were discriminated against on racial grounds.

VII. ACCESS TO SALARIED POSITIONS

101. Lukens' salaried work force, as described to the Federal Government as of July 14, 1983, consisted of the following:

Category	Total No. Employees	Total No. Black Employees	Percentage Black
Executives	45	0	0
Middle management	149	2	1.3
First-line management (including foremen)	432	30	6.9
Professionals	194	12	6.1
Technicians	419	10	2.3
Salesmen	17	0	0
Office and clerical	396	18	4.5
Plant protection	43	5	11.6
General service workers	46	10	21.7

(Exhibit P-392)

102. Most Lukens professionals and technicians are hired from outside, but other salaried positions are usually filled from within. Of the 11 top officials at Lukens in 1979, 3 had advanced from initial positions as hourly

workers. Virtually all foremen and general foremen have been promoted from within the hourly work force.

103. Except for professional and technical positions, there are no educational requirements for other salaried positions. In 1979, four of Lukens' top eleven official had only high school educations, for example.

104. There are very few blacks among Lukens' operating management. Lukens has never employed a black officer, manager, or superintendent. Lukens has had only one black supervisor, and he achieved that position in 1974, after this suit was filed. There were no black general foremen at Lukens until the 1970s, and as of January 7, 1977, only four blacks were included among the 57 general foremen.

105. I accept as correct the following statements from Lukens' proposed findings of facts Nos. 217 and 218:

> ". . . Movements to salaried positions, unlike movements within the hourly work force, are not affected by the collective bargaining agreement, and hence present an opportunity for the company's exercise of unfettered discretion . . . From the point of view of evaluating discrimination in an employer's practices, it may even be that the single most important set of data involves its selections for foremanship positions . . . This is true both because of the fully discretionary nature of the selection process and because of the particular impact of foremen on the hourly work force generally. . . ."

106. The following table shows the promotions to the position of foreman by race and year:

Year	Total	Black	% Black
1969	17	1	5.9
1970	23	2	8.7
1971	7	3	42.9*
1972	4	2	50.0*
1973	23	4	17.4
1974	29	7	24.1
1975	6	2	33.3
1976	14	3	21.4
1977	17	6	35.2
1978	22	5	22.7
	162	35	21.6

* In view of small numbers involved, the figures for these years are relatively unimportant.

107. Data concerning movements from hourly to salaried positions are available only from 1971. During the entire period from 1971 through 1978, a total of 185 employees moved from hourly to salary status. Of these, 39 (21.1%) were black.

While these figures suggest that Lukens has been "promoting" blacks to salaried positions in proportion to their number among the hourly work force, they do not negative racial discrimination, since they include transfers to *all* salaried positions, and thus include movements into janitorial, clerical, and plant-guard positions.

108. The process by which persons are selected for promotion to salaried positions at Lukens has remained essentially unchanged since 1954. As Lukens concedes, the process is essentially subjective and standardless. While employment department personnel may make recommendations, the final decision rests exclusively with the superintendent of the operating department in which the vacancy exists.

109. At various times, Lukens has required candidates for salaried positions to take various tests. Principal

among these is the "Activity Vector Analysis"; each individual being considered for appointment to a salaried position is required to fill out an AVA personality evaluation form (Exhibit P-379), and this is considered in the selection process.

While some Lukens witnesses testified that there is no passing or failing grade on the AVA test, other evidence makes it clear that applicants are in fact generally regarded as having either "passed" or "failed" the AVA test. For example, Exhibit P-873 is a memorandum dated March 31, 1970, between two Lukens superintendents, referring to the fact a particular candidiate had "passed employment's AVA 12-28-67." Exhibit P-1338 is a memorandum from a superintendent to the Employment Department, requesting that a white employee be promoted to foreman even though he "failed" the AVA.

110. The AVA test has never been validated; Lukens officials were aware that the test is not highly regarded among persons knowledgeable in the field of industrial psychology.

111. Until at least 1974, Lukens also used the Wonderlic test as a screening device for promotion to foreman. Lukens has also used the Schubert General Ability Battery in filling salaried vacancies. Neither of these tests has ever been validated.

112. The evidence overwhelmingly establishes that Lukens discriminated against blacks in the selection of foremen until at least 1971. The relevant facts are set forth below:

a. In 1967, Lukens official James Hall, in a memorandum, described one black candidate for a foreman position as "poised and articulate for a Negro" (P-390).

b. Between 1956 and 1963, class member Samuel Baxter made persistent efforts to become a foreman. He was told to "forget it" and, on at least

two occasions, was specifically informed by his superintendent that, but for the fact that he was "a colored man" he would be considered for the promotion.

c. During about the same period, class member Wilfred Mayfield also sought to be promoted to foreman. He was required to take a test, but was never informed whether he had passed it or not. When he was interviewed, a Lukens official asked Mayfield how he would feel about giving orders to white employees, and whether he felt white employees would be comfortable accepting orders from him. During this same period, at least two other white individuals in his department became foremen, and one of them told Mayfield that he had not been required to take any test for the job.

d. In the early 1960s, class member Jacob Meeks was told by his white general foreman that he (Meeks) might become a foreman if he would "ride the asses of the colored boys". When Meeks replied that he would "ride" the whites as well, the superintendent told him that he would never become a foreman.

e. In 1964, named plaintiff Ramon Middleton inquired of his white foreman about the possibility of being promoted to a foreman position. He was told that the only thing a black man could do for him was to "give him his sweat"; but that if Middleton behaved himself for two or three years he might be recommended for promotion to foreman. Middleton was later permitted to take a test for the position, but was never informed of the results, and was never offered a foreman job.

f. There were numerous instances, both before and during the limitations period, in which, when

there was need for a temporary foreman in a particular department, only white employees would be informed of the vacancy, or be considered for promotion. (*E.g.*, class members Eugene Lopp, Samuel Brown); and numerous instances when blacks were "given the runaround" when they expressed interest in being promoted (*e.g.*, class members Joshua Grove, William Lambert, James Thompson).

g. The experience of class member James Thompson, beginning in the 1950s and extending well into the limitations period, is instructive. He was a very good and reliable employee in the Pits Subdivision, which was almost entirely black. For 18 years, Thompson made repeated efforts to gain a foreman position. Initially, he was told he would have to "wait his turn". Later, after several whites had been promoted to foremen in the (black) subdivision, Thompson learned from fellow-employees that he would have to take a test in order to be considered for the job of foreman.

At the time, Thompson was working the 11 p.m. to 7 a.m. shift. He received a note to report to the clerk in the Open Hearth Department at 8 a.m., at which time he was told that he was scheduled to take the foreman test at 3 p.m. that same afternoon. Thompson resided in Maryland, and a snowstorm had been forecast. He asked if it would be possible for him to take the test at a different time, so that he would not have to make the round trip to Maryland in a snowstorm, but was curtly advised that he would either take the test when it was scheduled, or not at all. Thompson drove home, obtained new snow tires, and returned to take the test as scheduled. A white foreman told him that he was the first black employee in the Pits Subdivision to pass the test for foreman. However, he was not promoted.

Thompson continued to press his efforts to become a foreman. He took the test a second time and passed, but again was not promoted, allegedly because there were other black employees, with greater seniority, who had also passed the test earlier. (This in spite of the fact that seniority is not a factor in promotion to foreman, and in spite of the earlier advice that he, Thompson, had been the first black to pass the test.) Two white foremen in the Pits Subdivision had less company seniority and less unit seniority than Thompson.

On March 31, 1970, the acting superintendent of the Melting Department wrote a memorandum to the superintendent of the Melting and Casting Department stating that Thompson had made several requests over the past three years about promotional opportunities (Exhibit P-873). In that memorandum, Thompson was compared only to other black employees. The memorandum confirmed that Thompson had been told that "his name is in the hopper". The memorandum noted that Thompson had no experience as a ladleman. Actually, Thompson had had such experience; moreover, he had never been informed that such experience was a requirement for the foreman position.

Of particular significance, the memorandum noted that Thompson had "used the term 'discrimination' when talking about the pit-floor and promotional opportunity."

Thompson was never promoted to the position of foreman, and spent his entire 18 years at Lukens in seniority units which were predominantly black.

h. During 1969 and 1970, 40 persons were promoted to the position of foreman. Only three of these (7.5%) were black (Ex. L-66). During those years, minority employees constituted 23.8% of the hourly

work force (L-60). Thus, blacks were promoted to foremen positions during those two years at a rate less than one-third their representation in the pool from which foremen were promoted; a gross disparity which, coupled with the anecedotal evidence, satisfies me that blacks were intentionally denied promotional opportunities, on account of race, at least until 1971.

113. While there was arguable improvement in the situation beginning in 1971 (four of the 11 persons promoted to foreman in 1971 and 1972 (36.3%) were blacks), it was not until 1973 (the year in which this suit was filed) that any real progress occurred. Even by September 1, 1977, blacks constituted only 12.7% of Lukens' foremen.

114. While Lukens did, from 1973 through 1978, promote blacks to foremen positions in proportion to their membership in the hourly work force, even this fact does not rule out racial discrimination during that period, since it is at least arguable that the appropriate "pool" of applicants qualified for promotion to foreman should have included a greater percentage of blacks than their representation in the entire hourly work force, in view of the earlier systematic exclusion of blacks from promotion.

115. During the six-year period, 1972 through 1977, 94 persons (24 blacks and 70 whites) were promoted to the position of foreman. More than 40% of the blacks so promoted were initially placed in pay grades 9 or below, as compared with less than 10% of the new white foremen. This represents a disparity more than 2.7 standard deviations from the random, and is statistically significant at the .01 level.

In *Castaneda v. Partida*, 430 U.S. 482, 489 n. 17, 97 S.Ct. 1272, 1277 n. 17, 51 L.Ed.2d 498 (1977), a deviation of "more than two or three standard deviations" was suggested as sufficient statistical proof of *intentional* discrimination.

Lukens' argument that disparities in pay-grade may not necessarily translate into lesser earnings is not persuasive, in the absence of evidence (presumably available to Lukens, but not presented) as to the actual compensation of these 94 persons.

VIII. RACIAL HARASSMENT AT LUKENS

Plaintiffs presented a mass of evidence of individual instances of racial harassment and/or discriminatory treatment. More than 100 such incidents or practices have been addressed in the testimony, involving approximately 35 individual employees. While many of the individual instances predated the limitations period (plaintiffs' evidence clearly fixes about 35 incidents as having occurred within the limitations period, and about an equal number as having occurred either within the limitations period or shortly before—*e.g.*, "in the late 1960s" or "between 1965 and 1970"), all of this evidence may properly be considered in assessing the conditions which prevailed during the limitations period. That is, in determining whether instances of racial harassment or discriminatory treatment during the limitations period should be regarded as mere isolated occurrences, or as supporting an inference of pattern or practice, pre-limitations events, if not too remote, provide useful information.

I do not propose to discuss each individual instance in detail. I have carefully reviewed and considered the voluminous submissions of the parties on these subjects. Several of the more egregious examples are, in my view,

too remote in time to be helpful. Many others lack adequate evidentiary support, or have been adequately explained as not involving racial considerations. Some of the more clearcut, and persuasive, examples will be set forth in the Findings of Fact immediately following.

116. In late 1973, Lyman Whitfield, a black, had been newly promoted to a foreman's position. He attempted to provide some direction and instruction to a white employee, whose nickname was "Bobcat". Bobcat angrily rebuffed Whitfield's instructions, and went so far as to state "You'll get yours, you fucking nigger."

Mr. Whitfield reported the incident, in writing, to his (white) superintendent, Mr. Cabot. Cabot arranged to have Bobcat report to his office for a discussion of the incident, but no disciplinary measures of any kind were taken against Bobcat.

Lukens' response to this evidence is totally unsatisfactory. Lukens asserts that Bobcat presumably was given a verbal reprimand, and that "there is no evidence of any basis for disciplinary action except the alleged racial remark." In the first place, the record fairly bristles with instances of black employees being severly disciplined for insubordination, with far less reason than was provided by Bobcat. But that is not the crucial point: The racial slur itself should obviously have triggered disciplinary action, quite apart from the insubordination aspect.

117. In February 1975, a white emplyee named Taylor improperly refused to allow Daniel London, a black, to use certain tools he had been directed to obtain. A heated discussion ensued, in the course of which Taylor called London a "black bastard", whereupon London struck Taylor a blow with his fist.

London was suspended for four days without pay, and was placed on probation for three years (he had no previous record of fighting, and the prescribed penalty for a first offense was four days suspension). Taylor, on the other hand, was not disciplined at all.

118. In May 1971, John Baxter, a black, was assigned to the position of checker in the Shipping Department. He was told by a white employee in that department that the job was really "a white man's job". And Charles Rice, a white gang leader in the Car Blockers Department, repeatedly told Baxter that the Shipping Department was "all messed up" by blacks.

119. Some time after mid-1968, a black employee named Boyd became foreman in the 206-inch Gas Cutting Department. Shortly thereafter, a mock-grave, complete with headstone and "KKK" symbols was constructed in that department, by unkown persons.

No disciplinary action was ever taken because of this incident. Lukens asserts that there was "no indication of who was responsible, and thus no occasion for disciplinary action."

There is no evidence as to what efforts, if any, were made to investigate this incident. I am inclined to believe that it should not have been very difficult to ascertain the identity of the probable culprits. But for present purposes, it suffices to note that if Lukens had conducted a thorough investigation, including interviews of the persons working in the department at the appropriate times, a salutary message would thereby have been delivered.

120. In 1969, Steven Branch, a black, became a millwright-helper. From that position, the next upward step is to class C millwright, class B millwright, and class A millwright. Helpers are expected to receive on-the-job training from other millwrights, in preparation for taking and passing the required examinations for each of these advancements. In the case of Mr. Branch, however, this proved difficult, because the other millwrights, all of whom were white, refused to talk to him because he was black.

Mr. Branch's difficulties continued through at least 1972. There were only 20 employees in the entire department, and it is therefore impossible to avoid the inference that the foremen and supervisors in that

department were aware of the racial tension and of Mr. Branch's discriminatory treatment. No corrective action was ever taken, nor was any discipline ever imposed upon any of the white millwrights.

I reject as unsatisfactory the response proffered by Lukens, namely, that Mr. Branch eventually did manage to get promoted up the career ladder to class A millwright, and that there was no evidence that the white millwrights had been specifically assigned to teaching duties, so as to be amenable to discipline for failing to perform teaching duties. Mr. Branch was plainly entitled to be treated the same as whites in equivalent positions, and the white millwrights were plainly subject to disciplinary action for racial discrimination. This entire episode amounts to clear evidence of Lukens' toleration of racial discrimination.

121. In 1971, while employed as a millwright, Steven Branch was usually assigned to work in the 120-inch mill. On occasion, he would be assigned temporarily to work in the 206-inch mill, but whenever he was dispatched to that department, he was not allowed to work there, but was invariably sent somewhere else. At least three other black employees, Tillman, Hooper and Washington, had the same experience.

Lukens asserts that this evidence should be disregarded, because plaintiffs did not present evidence that white employees were not also turned away when temporarily assigned to the 206-inch mill. In my view, however, the inference of racial discrimination is strongly supported by plaintiffs' evidence, in the absence of some reasonable explanation or refutation.

122. In late 1971, Charles Goodman, a black, was employed as a janitor. One of his jobs was to clean the "pulpits" (shelters raised above the ground, from which the rollers and presses run). One of the pulpits was kept locked. When given his initial tour of the area on a Friday afternoon, Goodman was provided with a key to this pulpit, which he was expected to clean before it was opened

the following Monday morning. The two employees working in the pulpit at the time were white.

When Goodman arrived at the pulpit on Monday morning, he found written on the wall of the pulpit the words "Go home nigger. You don't belong here."

Goodman reported the incident to the head of the Sanitation Department, Clarence Wirth, who is white. Mr. Wirth said, "Don't worry about it. Just go on back to work." No one was disciplined for this incident, although apparently the two white employees were required to remove the offensive language from the pulpit wall.

123. In 1974, Gary Jones, a black, was assigned to learn the job of heater, by working with an experienced heater named Derring, who was white. However, Derring refused to give Jones any on-the-job training and, indeed, would not speak to him. When Jones complained to the foreman, Derring told the foreman that he would not teach Jones anything.

Eventually, Jones was reassigned to a black heater for on-the-job training. No disciplinary action was ever taken against Derring because of this incident.

124. At some unspecified time "in the 1970s" James Clifford Kennedy, the only black general foreman at Lukens, was subjected to having the words "Uncle Remus" painted on his hard hat, and "KKK" symbols scrawled on his work papers; and, apparently, his work shoes were filled with sand.

125. In 1976, William R. Mayo, a black, became involved in a dispute with his general foreman, Earl Doan, who is white. In the course of a heated discussion, Mr. Doan stated, "You black people are all alike." No action was taken against Doan for this incident.

There was evidence of several other instances, mostly in the pre-limitations period, in which Mr. Doan exhibited unenlightened racial attitudes. The fact that Mr. Mayo was not himself disciplined on this occasion does not, in my view, negative the plain implication of toleration of discrimination by Lukens.

126. On several occasions between 1969 and 1972, Kenneth Young, a black crane operator, was singled out for unjust and harassing treatment by white foremen or supervisors (Messrs. Gay and McBride).

127. In 1972, Mr. Young, while working as a crane operator, was assigned to the loading bank of the 120-inch mill. No other blacks were employed in that area, and Young was subjected to constant harrassment, especially by a white employee named Trythall. A white foreman, Harris, reprimanded Young for his constant problems in getting along with Trythall. It is probable that Harris would have imposed the same discipline on Trythall if he had had authority to do so. In fact, however, Trythall was not disciplined; and even if he had been, this would still suggest that, at Lukens, when a white employee is involved in a racial dispute with a black, both are culpable.

128. During the 1970s, a white employee named Herbert Pratt was employed as a clerk. He constantly and repeatedly made racially derogatory comments to and about black employees, apparently in the belief that such remarks were humorous. Throughout 1974 and 1975, Pratt frequently made statements to the effect that the only employees who could get ahead at Lukens are blacks, and made racially derogatory remarks about blacks who took time off.

When Oscar York, a black, complained to his general foreman, Fred Nill, a white, about Pratt's conduct, Nill falsely claimed that he was totally unaware of the behavior. Actually, Nill could hear conversations occurring in Pratt's cubicle, and frequently laughed when he heard Pratt say something humorously derogatory about blacks.

Black employees complained to James Hall, Lukens' employment supervisor, about Pratt's habit of addressing blacks as "curly" when greeting them. In October 1978,

the Coatesville chapter of the NAACP formally complained about Pratt's having listed a black employee as "Geraldine" on a posted work schedule.

In response to these various complaints, Lukens officials discussed the situation with Pratt and urged him to mend his ways, and eventually gave him a written reprimand, which became part of Pratt's personnel file. On the other hand, no suspension or other substantial discipline was ever imposed against Pratt, and his conduct continued substantially unchanged until at least 1978.

129. A white general forman at Lukens, John Primer, made frequent derogatory remarks about black employees when they took time off. His expressed view was that blacks are lazy and do not want to work. He was never disciplined for this conduct.

130. In 1973, John Keller, a white, addressed racial remarks to a black employee in front of his supervisor, Denny Howell, also white. Howell testified at trial that he gave Keller a written warning for this conduct, but no such warning appears on Keller's personnel record. Three years later, in 1976, a similar incident occurred in the presence of Howell. Howell testified that Keller was disciplined by being suspended for one day; again, however, Keller's personnel record shows no such disciplinary action.

131. Racially derogatory graffiti have regularly and constantly appeared on the bathroom walls at Lukens for at least 30 years. From time to time, steps are taken to eradicate or paint over the offending material, but the respite is invariably brief. The evidence does not establish the identities of the culprits, needless to say.

It is clear that Lukens deplores the practice. On the other hand, plaintiffs correctly note that Lukens has not made any concerted effort to improve the situation. Not long before the onset of the limitations period, for example, a complaint to the white supervisor of the affected area concerning a particularly noticeable and offensive racial slur on the wall was greeted with a shrug and the

statement "I didn't put it there." And it was not until after the start of trial in this case that Lukens, for the first time, posted notices formally prohibiting the practice, and informing employees that persons found guilty of defacing the premises with racially offensive remarks would be disciplined.

132. On an occasion (date uncertain, but within the §1981 limitations period) a cross was burned in an area where many blacks would normally congregate to change clothing. The record does not disclose the extent of the investigation, if any, which Lukens may have conducted after this incident. It is clear that no one was disciplined.

133. On July 12, 1978, at least three Lukens employees, one of whom apparently was a salaried employee, wore Ku Klux Klan armbands to work at Lukens. The two hourly employees involved were ostensibly given a three-day suspension as punishment; however, the scheduling of the suspension was such that one lost one day's pay, and the other lost four hours' pay.

134. From the evidence in this case, taken in its entirety, there emerges a reasonably clear picture. For decades, the races at Lukens were segregated, as a matter of official company policy. It was not until 1966 that segregation in locker room facilities was finally eliminated. Many of the same officials who occupied positions of authority during the segregated period continued to occupy positions of authority, at an even higher level, during the limitations period; and several of these were shown to have been involved in overt racial discrimination in the pre-limitations period.

There can be no doubt that a substantial number of white employees on the Lukens payroll harbored strong feelings of racial prejudice against blacks. Lukens employees, like everyone else, became aware of the civil rights struggles of the 1960s, but that did not automatically translate into changes in racial attitudes. Indeed,

given the generally prevalent ambivalence toward "demonstrations" and "demonstrators", it is reasonable to suppose that racial tensions increased, or at least surfaced to a greater extent, during that period.

It is apparent that Lukens management preferred to avoid confronting racial issues if at all possible. Some foremen and higher officials—undoubtedly, only a few—shared the racially biased attitudes of some of the white hourly employees, and most of the rest of Lukens management were apprehensive—unduly so, probably—about the potential adverse effects upon the morale of the white work force, if prompt and significant changes in favor of blacks were implemented.

The net results were (a) too-frequent toleration of continued harassment of blacks by whites, on racial grounds; (b) passive encouragement of the belief that individual acts of racial discrimination would go unpunished; and (c) a tendency to presume that any charge of racial discrimination was, almost by definition, either totally unfounded or quite trival.

IX. MISCELLANEOUS MATTERS

A. *Suggestion Awards*

135. Lukens has long maintained a "suggestion system" offering rewards to employees who make suggestions for the improvement of the company's methods, products or services. The Lukens' Employee Manual states "All suggestions are investigated carefully by the people best qualified to judge their value. If a suggestion is found to be useable, you receive a cash award based on its estimated value to your company." (Exh. P-339A, p. 27.)

Over the period from 1965 through 1976, Lukens made 2,267 awards, totaling $185,825.25 to white employees for suggestions, and 75 awards totaling

$5,205.25 to black employees for suggestions (Exh. P-144) (there were also 13 awards, totaling $432.50, to employees whose race is not disclosed). Thus, black employees received 3.2% of the awards, and 2.8% of the money awarded.

136. Analyzing salaried and hourly employees separately does not significantly alter the disparity. Blacks received 3.5% of the awards given to hourly employees, and 1.6% of the awards given to salaried employees. Limiting the analysis to the limitations period does not alter the disparity: blacks received 2.9% of the awards and 3.2% of the money awarded, between 1968 and the end of 1976.

137. Plaintiffs presented the credible evidence of class member Jacob Meeks, to the effect that he and other class members had made suggestions for which they received no awards, even in the cases where the suggestion was adopted and implemented, whereas white employees received awards for suggestions which proved to be impractical. Lukens presented no testimony or other evidence on this subject.

138. Lukens correctly points out that there is no evidence concerning the relative number, or the relative merit, of suggestions presented by blacks and whites respectively. Thus, the statistical evidence cannot be interpreted as proving that decisions to grant or withhold awards for suggestions were made in a racially discriminatory manner.

But this does not mean that the foregoing evidence should be totally disregarded. There are only a limited number of permissible inferences which are consistent with the statistical evidence outlined above. If the percentage of participation by blacks and whites in the suggestion program is roughly proportionate to their respective numbers in the work force, there are only two possible conclusions: either racial discrimination tainted the evaluation and award process, or blacks, as a group,

systematically, year in and year-out, produced suggestions having less merit than the suggestions made by whites. I regard the latter possibility as distinctly far-fetched.

If, on the other hand, only 2 or 3% of the suggestions were made by blacks (*i.e.*, if the percentage of black participation in the suggestion program was sufficiently low to justify the conclusion that the small percentage of black awards was racially neutral), it would be difficult to conclude that blacks were made aware of, and encouraged to participate in, the suggestion awards program to the same extent as their white counterparts.

In short, while the statistics of the suggestion awards program do not provide definitive answers, the gross disparities reflected therein do raise further serious questions about racial equality at Lukens.

B. *Lukens' Affirmative Action Efforts*

139. The hierarchy of Lukens officials responsible for equal employment opportunity matters is as follows: J. Louis Irwin, as head of Industrial Relations, was the person in Lukens' management ultimately responsible for equal employment opportunity affairs from 1964 until 1979. Under him, from 1966 through 1979, was Norris J. Domangue, Director of Personnel Administration; he has general oversight responsibilities for the EEO office at Lukens.

Under Domangue, James Hall, head of the Employment Office, has been in charge of developing Lukens' affirmative action programs for submission to the Federal Government, since before 1970. At the time of trial, Barry Patterson headed the company's EEO office, assisted by John Robinson, Jr. Before the EEO office was formally organized (in about 1974), Hall was responsible for carrying out what later became that office's functions.

Of the five persons named above in this hierarchy, only Robinson is black; his services began after this lawsuit was filed.

140. Notwithstanding the massive amount of incontrovertible evidence of historical discrimination on account of race at Lukens, all five of these persons, in their trial testimony, professed total ignorance of any racial discrimination at Lukens at any time.

141. Mr Irwin, who has been employed at Lukens since 1933, testified that the racially disproportionate nature of seniority subdivisions (including units which were entirely black and other units which were entirely white) was the result of personal choice on the part of employees. He based this conclusion solely upon his observation that, indeed, some units were either entirely black or entirely white.

On the basis of his personal view that blacks preferred to be with each other rather than with whites, Irwin further testified that segregation of the locker rooms at Lukens occurred entirely as a result of personal choice of the employees. And, based upon his familiarity with Coatesville and its inhabitants (he having been born there), Irwin further testified that Lukens has had a policy of non-discrimination throughout his entire tenure with the company; and that, as far back as 1933, there has been a consistent trend toward greater opportunity for blacks at Lukens.

Conceding that from time to time he had received complaints about racial discrimination at Lukens, including some from the NAACP, Irwin nevertheless concluded that, as to each and every one of these complaints, intentional racial discrimination was not involved. Presented with a 1970 document which he had received from another company official, John Muhs, and which expressly referred to "past racially discriminatory hiring practices" at Lukens, Irwin testified simply that he did not know what hiring practices Muhs was referring to.

142. Mr. Domangue, who has been employed at Lukens since 1957, testified that, even before 1964, racial discrimination did not provoke complaint or discontent among black employees; that race never was a factor in the assignment of lockers; that any employee was free to take any available locker as his own; and that the racial composition of the various subdivisions at Lukens is not a result of racial discrimination.

143. Mr. Hall testified that no management person at Lukens had ever suggested that blacks at Lukens were ever treated differently than whites because of their skin color. Hall testified that he himself has always tried to deal with people in a color-blind way.

In a memorandum prepared by Mr. Hall shortly after he was visited by EEOC investigators in 1972, he noted the race of the investigators in the opening paragraph of his report (Exh. P-389).

In 1979, John Robinson prepared a study, at Hall's direction, which showed that a disproportionate percentage of black employees who reapplied for employment at Lukens after having previously worked there were rejected by the company. The only action taken by Hall in response to this study was to examine some of the underlying data himself.

144. Mr. Patterson, after having worked in the EEO office for four years, testified that he had never encountered a single case in which he was able to conclude that Lukens was engaging in racial discrimination, or a single instance of harassment directed at blacks on racial grounds. In Patterson's view, complaints of such harassment were, for the most part, attributable to the fact that the employee in question "perceived" racial discrimination where none in fact existed.

145. The testimony of Mr. Robinson, to the effect that during his two years as Patterson's assistant in the EEO office, he likewise has found no incident in which he felt there was any racial discrimination, is largely neutralized, since he began work there after this lawsuit was

filed, and has been largely preoccupied in gathering statistical information for Lukens' defense of this suit.

146. Lukens' formal affirmative action efforts were prompted by the enactment of Title VII, the promulgation of related executive orders, and Lukens' substantial involvement in government contracts.

147. In June 1964, Lukens promulgated a document entitled "Plan for Progress," setting forth what were purportedly the company's goals for achieving equal treatment of minority employees. As director of industrial relations, Mr. Irwin was chairman of the "Plan for Progress Committee".

148. A 1964 company memorandum describing the "Plan for Progress" stated that Lukens has a "longstanding policy of non-discrimination in employment"; when that statement was made, locker rooms at Lukens were still segregated.

The same memorandum, in noting that "Negroes [are] heavily concentrated in the lower job classes" lists as one potential contributing factor to that phenomenon "lack of personal motivation and initiative."

149. In late 1970, Lukens promulgated a document entitled "Affirmative Action Policy" which was identified as "a revision of Lukens' 'joint statement of Plan for Progress' adopted in 1964." This document, written by Mr. Hall, also refers to Lukens' "longstanding policy of non-discrimination in employment."

150. According to the 1970 affirmative action policy, "a Plan for Progress Committee was formed, and a program of action initiated" beginning in 1964; and the Committee was "charged with establishing policy, outlining objectives, stimulating action, and reporting results." The evidence at trial makes clear that the activities of this Committee and the results of its efforts, if any, were decidedly limited.

151. As the director of Industrial Relations, Mr. Irwin sent a memorandum to various Lukens officials in 1970, directing that Lukens' Affirmative Action Program

be considered "confidential", and "to be made available only to committee chairmen and members of the Advisory Committee." The committees referred to were formed ostensibly for the purpose of implementing the Affirmative Action Program; the committee chairmen were all white Lukens officials. There is no explanation in the record as to why the program should have been considered "confidential"; indeed, Mr. Domangue testified that he knew of no reason why the company's Affirmative Action Program could not have been shared in its entirety with Lukens' employees, or why the program should have been marked confidential.

Lukens asserts, in its post-trial submissions, that the Affirmative Action Program had to be kept confidential because it contained information concerning Lukens' work force and operations which might have aided its competitors. Apart from the fact that there is no evidence which supports this argument, it seems obvious that the existence of an affirmative action program, and a redacted version of the plan, could have been disclosed.

152. Under the Affirmative Action Program, an Affirmative Action Committee was established. Mr. Hall was a member of that Committee. Mr. Hall testified that, while the Committee did not meet on any scheduled basis, it did meet fairly often. Actually, however, between April 1971 and October 1972, a period of 17 months, there was not a single meeting of the Affirmative Action Committee (P-1214).

153. The 1970 affirmative action policy document refers to "disproportionate, racially segregated, seniority units" at Lukens (P-114, p. 3). But the 1972-1973 affirmative action policy document, prepared after the charges involved in this litigation had been filed with the EEOC, contains no such reference (P-124). There had been no substantial change in the racial composition of seniority units in the interim.

154. The Office of Federal Contract Compliance Programs ("OFCCP") makes periodic reviews of Lukens Affirmative Action Programs and efforts, for the purpose of ensuring compliance with Executive Order 11246. The results of these reviews have a substantial bearing on whether Lukens may continue to contract with the Federal Government.

155. As part of its obligation under this review, Lukens supplies to the OFCCP statistics showing the breakdown of the work force between craft and non-craft jobs. In making this breakdown, Lukens did not use the job classifications set forth in the collective bargaining agreement, but rather classified as craft jobs additional jobs not so characterized in the collective bargaining agreement. This enabled Lukens to report to the OFCCP that minorities were represented in craft jobs at much higher percentages (more than 50% higher) than would have been reflected if the collective bargaining agreement classification scheme had been utilized.

156. Mr. Hall, who had major responsibility for dealing with the OFCCP, testified at trial that Lukens' Affirmative Action Program had been approved by the OFCCP. It turns out that Mr. Hall was in error.

The OFCCP has determined that Lukens' 1978-1979 Affirmative Compliance Program is not acceptable (P-1405). In a letter to Charles A. Carlson, Chairman of the Board of Lukens, the Director of the Philadelphia Office of OFCCP, Thomas S. Bush, stated, "It has been determined as of September 21, 1979, that Lukens Steel Company does not have an acceptable written Affirmative Action Compliance Program." This letter was a confirmation of matters discussed during a "close-out conference held September 21, 1979" at Lukens, attended by Messrs. Irwin, Domangue, Hall, Patterson, and Robinson. The letter further states that "Your facility cannot be considered in compliance with Executive Order 11246, as amended, unless a binding conciliation agreement is received which reflects a statement of each

deficiency, the citation of the violation, and the corrective action taken".

When Lukens responded to a subpoena issued by plaintiffs, requiring all correspondence from the OFCCP regarding Lukens' affirmative action compliance status, no conciliation agreement was included (P-1425).

157. Mr. Patterson, the Equal Employment Opportunity Administrator at Lukens, has been employed at Lukens since 1971, and has headed the EEO office since January 1976. He had no professional experience in the equal employment opportunity area, nor had he participated in any equal employment or civil rights organizations. Throughout his first five years at Lukens, he was involved exclusively in the area of public relations.

158. Among Patterson's responsibilities as head of the EEO office is the handling of all official and unofficial complaints of discrimination filed against the company by applicants or employees. He also has responsibility for drafting the company's Affirmative Action Plans, and for dealing with governmental agencies on equal employment opportunity problems.

159. Mr. Patterson has been aware, throughout his tenure at Lukens, that there are job groups which are disproportionately white and other job groups which are disproportionately black. Nevertheless, as head of the EEO office, he has never engaged in any investigation, and does not know of any investigation, as to why these disparities existed. He did not conduct, and does not know of any, investigation into the disparate impact of the transfer procedure at Lukens.

160. At the time of trial, Mr. Patterson had been head of the EEO office at Lukens for four years. Twenty members of the plaintiff class testified at trial that they did not even know who he was. This does not, of course, mean that they did not know there was an EEO office at Lukens, but it strongly suggests something less than enthusiastic dedication to EEO issues on the part of that office.

161. In late 1978, class member Wilfred Mayfield felt that he was being discriminated against on racial grounds in connection with certain scheduling problems. His white supervisor, Mr. Glazer, agreed that there was merit to his complaint, but stated that he had no power to change the situation, and suggested that Mayfield consult his union representative. Mayfield's dissatisfaction continued, after consultation with union representatives, and he discussed his problems with OFCCP officials who happened to be in the Coatesville area. They suggested he consult Mr. Patterson. Mayfield did not know who Patterson was, and the OFCCP officials told him. Mayfield consulted eight or ten other black employees, none of whom had ever heard of Patterson.

Mayfield arranged an appointment with Patterson for the following day at 4 p.m. When he arrived for his appointment, Patterson was not present, but his assistant, John Robinson, met with Mayfield. In the course of their conversation, Mayfield asked Robinson how long the EEO office had been in existence, and learned that it had been established about three years earlier. Mayfield then asked why it was that so few people knew about the office. Robinson told him that the EEO office had orders from "higher up" to operate on a very low key.

Mayfield was told by Robinson that he would set up a meeting with the appropriate officials to discuss Mayfield's problem. About a week later, Mayfield was told that the meeting had been set up, but that Mayfield's attendance would not be appropriate. Mayfield never received any further information about whether the meeting was held, or what the results may have been. Periodic inquiries since then produced no results. As late as February 1980, during a recess in the trial of this case (some 14 months after the initial contact with the EEO office), Patterson advised Mayfield that he was "still working on" the problem.

162. Lukens has undoubtedly made some efforts to pursue affirmative action goals during the limitations period, and has made some progress. As noted above, Lukens established an EEO office, or its equivalent, in 1974. The EEO office is located in close proximity to the employment office. Personnel in the employment office have been made aware of Lukens' commitment to affirmative action and equal employment opportunity during their training and at weekly meetings, attended by representatives of the EEO office. Lukens has undertaken a program of recruiting at black colleges, including Cheyney State College, Lincoln University and Southern University; has participated in cluster programs at black institutions in other parts of the country, including Atlanta University; and has implemented programs at the local level to increase employment opportunities for blacks. Specifically, since 1968, Lukens has worked with the Coatesville area school district in a hardcore unemployment program ("STEP") and a counseling and training program ("CASH"). And Lukens has been involved in the National Alliance of Businessmen JOBS program, involving commitments to the hiring of underprivileged individuals, principally black.

On the other hand, none of these programs or efforts appears to have had much actual impact upon the conditions and atmosphere of the work place. At least until well after this lawsuit was filed, Lukens' efforts were plainly kept rather quiet, so as to avoid both the "problems" with white employees harboring racial prejudices, and the need to acknowledge, and face up to, the reality of past and continuing discrimination. The inference is reasonably clear that Lukens was primarily interested in providing evidence of progress sufficient to satisfy the OFCCP and other governmental agencies, but either did not understand, or resisted the idea, that genuine and substantial deviations from customary attitudes and employment practices would be required.

163. For example, so far as the record discloses, only a single black person was hired by Lukens as a result of its allegedly extensive college recruitment efforts.

164. Class member Al Carey, a black, served for two years as Lukens' "recruiter" among black colleges in this vicinity. Because Lukens was primarily interested in college graduates with technical backgrounds, Mr. Carey admittedly had somewhat less opportunity for recruitment than did recruiters from other corporations. Nevertheless, during his two-year stint, he located, and referred to Lukens, at least 16 qualified blacks, all of whom applied for employment. None of these 16 applicants was hired.

After two years, Mr. Carey quit the recruiting program. It was his feeling that he was being "used" by Lukens, in an effort to create the appearance of equal opportunity, but that genuine commitment to that principle was lacking.

165. Lukens points to two other aspects of the evidence, as demonstrating Lukens' efforts to ensure greater opportunity for minority employees: (a) an instance in which Lukens allegedly lowered the passing score on a test so that a black could obtain promotion, and (b) Lukens' ongoing, albeit unsuccessful, efforts to merge seniority units. Upon closer examination, however, these arguments backfire.

a. On an occasion in 1975, the passing score on a shop math test was lowered in connection with a job posting for the Mechanical Riggers Subdivision, and this enabled class member Hilton Matthews to qualify for a transfer into the unit. But the same lowering of the passing score also enabled two white persons, Messrs. Tomaski and Perring, to qualify; and, when the transfers were effectuated, the two whites were placed above Matthews on the seniority list, even though they had less company seniority, and equal unit seniority, with Matthews.

b. Under the terms of the collective bargaining agreements, the company has complete control over job assignments and changes within a seniority unit, but cannot assign an employee in one seniority unit to perform work in another seniority unit. And transfers from one seniority unit to another are, of course, governed by the job-posting and company seniority procedures. Accordingly, a fairly constant theme of collective bargaining negotiations over the years has been the company's desire to reduce the number of seniority units through mergers and consolidations, and the unions' opposition to these efforts. But, as the evidence presented by the defendant unions demonstrates, the company's merger proposals have never been put forward as intended or expected to ameliorate racial disparities among the existing units; indeed, many of these proposals would have merged white units with other white units, or black units with other black units.

X. PLAINTIFFS' CLAIMS AGAINST THE UNION DEFENDANTS

166. The defendant International Union is the recognized bargaining agent, certified by the National Labor Relations Board, for each of its locals, including Locals 2295 and 1165. Collective bargaining agreements are negotiated by the International Union on behalf of local unions. In practice, the International Union negotiates "basic steel" agreements with the nine or ten largest steel companies, leaving to local bargaining only the implementation of the basic steel terms or the correction or improvement of those terms to suit local conditions.

167. The International and the local unions jointly "act exclusively as the member's agent" in grievance proceedings and "other matters relating to terms and conditions of employment arising out of the employer-employee relationship" (U-359, Article XVII, Section 3,

p. 92). An International staff representative is present at Lukens at all times, and is in charge of the local collective bargaining, and also all fourth-step meetings and arbitrations in the grievance process. The district directors of the International Union also have some responsibilities for the local collective bargaining negotiations.

168. Since 1956, all hourly employees at Lukens have been required to join either Local 1165 or Local 2295 after having been employed by the company for 30 days.

169. At the time of trial, Local 1165 had approximately 2,600 members, and Local 2295 had approximately 80 members (down from a World War II maximum of approximately 600 members).

170. Local 2295 has jurisdiction only within the Welded Products Division of Lukens, which has historically been predominately white. Accordingly, Local 2295 has had very few black members (not more than 12 at any one time since 1967) and has never had a black president.

171. Local 1165 has many black members (presumably, approximately 25% of the membership) and blacks have actively participated at its meetings and in its affairs, although no black has yet been elected president of Local 1165.

172. As discussed previously in this Opinion, the evidence as a whole does not preponderate in favor of a finding that the union defendants (or, more properly, their predecessors) were motivated by racial considerations in establishing the seniority system at Lukens. And, under established precedent, the unions' resistance to the abandonment or undermining of the seniority principle as an acceptable method of achieving greater racial equality is not actionable.

173. There is a great deal of evidence pertaining to pre-limitations events which casts serious doubt on the unions' total commitment to racial equality during that period. For example:

a. The 1962 "basic steel" negotiations produced agreement upon the inclusion of a provision outlawing racial discrimination. At the local negotiations at Lukens, however, the possibility of including that clause in the Lukens agreement was not even discussed. No such non-discrimination clause was included in a Lukens agreement until 1965; and then, apparently, it came as the result of a suggestion by the company, rather than the unions (and one need not be unduly cynical to suggest that, by that time, it was thought desirable to include such a clause, for OFCCP purposes).

b. The unions never took any action to complain about the segregated locker facilities or other blatantly discriminatory practices at Lukens. Indeed, when, pursuant to pressure from the Pennsylvania Human Relations Commission, Lukens was required to complete the process of desegregating the locker rooms, the unions' International representative informally allowed Lukens an extension of time to complete the transition. As noted elsewhere in this Opinion, the process of desegregation was not complete until 1966.

c. In 1962 or earlier, class member Joshua Grove complained to Local 1165 President Joseph Foy about the segregated facilities. Foy told Grove that the company would not then agree to integrate and upgrade the locker room facilities, and asked Grove to delay filing a charge with the Pennsylvania Human Relations Commission, voicing concern over possible "repercussions" if racial integration were pushed.

d. In the mid-1960s, a group of black employees in the Open Hearth Pits Subdivision organized a committee and complained to the company about the segregated facilities and other discriminatory

policies. Although at least two members of the committee were union shop stewards, they received no help from the union. Indeed, at trial, the gentleman who had served as president of Local 1165 from 1964 to 1970, testified that he was unaware of the existence of any such committee, and had no recollection of any group of black employees having complained about racial matters at the time.

174. The evidence reviewed in the preceding findings does not provide grounds for relief against the defendant unions in this case. We are concerned here with actions and practices during the limitations period.

175. Plaintiffs assert that the unions have discriminated against blacks during the limitations period in its handling of grievances under the collective bargaining agreement. Upwards of 8,000 grievances have been filed at Lukens during the limitations period. The steady increase in grievance filings each year has not produced a corresponding increase in the capacity of the grievance-processing system to handle complaints. As a result, the grievance procedures at Lukens are characterized by the following:

a. Serious grievances (*i.e.*, those involving more than a four-day suspension, and those involving discharges) are given priority. And, because each "zone" within the plant handles its grievances separately at the early stages, and fourth-step hearings are held only once or twice each month, an attempt is made to allocate the hearing-time among the zones.

b. The time limits imposed by the collective bargaining agreement for scheduling the various steps of the grievance procedure are not being met, and are largely ignored.

c. In an effort to alleviate the backlog, there has been an increasing tendency on the part of the

unions to dispose of less-serious grievances by simply withdrawing them "without prejudice". This means that the affected employee gets no relief but that the union is not precluded from challenging that grievance on the merits in a later grievance proceeding.

In short, the manner in which the unions handle employee grievances at Lukens does not fully comport with the terms of the collective bargaining agreement, and is subject to legitimate criticism. There is, however, no hard evidence to support an inference that these inadequacies disadvantage blacks to a greater extent than whites. Some members of the plaintiff class testified to a general perception among black employees that their grievances are handled less expeditiously and with less enthusiasm than the grievances of white employees, but it seems clear from the evidence that whites and blacks alike have reason to complain.

176. An analysis of the grievances which reach the final step, arbitration, reveals that grievances asserted on behalf of black employees represent approximately the same percentage of such grievances as the percentage of blacks in the hourly work force. And some evidence presented by Lukens suggests that there is approximately the same racial breakdown of grievances initially filed, although the evidence is not entirely clear on that point. And the union defendants have presented evidence tending to show that, among grievances pursued through arbitration, success was achieved on behalf of black grievants at a slightly better percentage than whites. Specifically, 46.5% of black grievants achieved success in arbitration, compared to 31.8% of white grievants.

I find it impossible to draw any definitive conclusions from this evidence. It may mean that blacks are more likely than whites to be the targets of undeserved discipline serious enough to warrant arbitration. It may

mean that either the unions, the company, or both are more inclined to, or at least more successful in, settling white grievances short of arbitration. Or it may mean that the unions more diligently pursue black grievances than white. It may mean none of the above.

Plaintiffs correctly point out that, in the absence of evidence showing what percentage of all grievances, black grievances and white grievances are pursued through arbitration it is difficult to draw any intelligent conclusions as to whether the unions do or do not discriminate against blacks in their handling of grievances. Plaintiffs complain that the unions' records on grievances are filed by grievance number, rendering it exceedingly difficult to locate and verify particular grievances; rendering it exceedingly difficult to achieve the required racial analyses. The unions contend that, while admittedly difficult, such information could have been derived from the unions' records, but plaintiffs failed to explore it. In my view, plaintiffs' generalized evidence concerning perceptions about racial inequities in the handling of grievances does not, without more, establish a prima facie case in this respect. I do not believe that any significant adverse inference can properly be drawn from the manner in which the union keeps its records pertaining to grievances.

In short, the evidence as a whole is inconclusive on this issue.

177. Plaintiffs are on firmer ground, however, with respect to the unions' repeated failures, during the limitations period, to include racial discrimination as a basis for grievances or other complaints against the company.

a. *Probationary Employees*. Under the terms of the collective bargaining agreement, the protections afforded probationary employees are quite limited; so much so, in fact, that the unions have pursued a uniform policy of not filing grievances on behalf of probationary employees, for any reason.

Ever since 1965, however, the collective bargaining agreements have prohibited the company from discriminating against any employee, probationary or permanent, on racial grounds (*see*, *e.g.*, N.T. 24.97-99, 24.104-107).

The Union knew that blacks were being discharged by Lukens at a disproportionately higher rate than whites (U-248; N.T. 14.58-59).

b. *Testing*. Although the unions did object to Lukens' use of tests of all kinds, the unions never based their opposition on the assertion that the tests had racially disparate impact, although the unions were certainly chargeable with knowledge that many of the tests, particularly the Wonderlic, were notorious in that regard. Instead, the unions argued only their traditional position (tests undercut the seniority principle, by favoring younger employees who have recently been in school over older employees whose formal education is more remote).

c. *Grievances*. It is undisputed that the unions were reluctant to assert racial discrimination as a basis for a grievance and almost never did so until after this suit was filed, even though many black employees asserting grievances complained about discriminatory treatment and harassment, and even though the union itself believed that racial discrimination was involved in the grievance. At first blush, the unions' explanation for this policy seems reasonable: In order to establish that a particular grievance had merit, it was necessary to establish a violation of the collective bargaining agreement. If such violation could be established, it was unnecessary to go further, and establish racial animus. And the company tended to "get its back up" and resist any charge of racial discrimination; or at least that was the union's perception of the company's position.

Upon reflection, however, I find this explanation unacceptable. In the first place, it overlooks the numerous instances of harassment, which were indisputably racial in nature, but which did not otherwise plainly violate a provision of the collective bargaining agreement. Thus, grievances involving no loss of pay or permanent disciplinary record were virtually ignored.

In the second place, it seems obvious that vigorous pursuit of claims of racial discrimination would have focused attention upon racial issues and compelled some change in racial attitudes. The clear preference of both the company and the unions to avoid addressing racial issues served to perpetuate discriminatory environment. In short, the unions' unwillingness to assert racial discrimination claims as such rendered the non-discrimination clause in the collective bargaining agreement a dead letter.

178. The unions argue that much of plaintiffs' case relates to discrimination in initial job assignments at Lukens and that, since the collective bargaining agreements do not give the unions any voice in initial assignments, they can bear no legal responsibility for any such discrimination. It is true that the unions have no control over the hiring process; selection of employees is entirely the prerogative of management. But once employees are hired, they are entitled to the protections of the collective bargaining agreement; and one of those protections is a prohibition against racial discrimination. To require blacks to continue to work in lower paying and less desirable jobs, in units disparately black, is to discriminate against them in violation of the collective bargaining agreement (and, of course, also in violation of Title VII). It is very clear, on the record in this

case, that the defendant unions never sought to avail themselves of this rather obvious mechanism for protecting the interests of their members.

Contrary to the union's arguments, mere union passivity in the face of employer-discrimination renders the unions liable under Title VII and, if racial animus is properly inferrable, under § 1981 as well. *McDonald v. Santa Fe Trail Transportation Co.* 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976); *Maklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C.Cir.1973); *Dickerson v. United States Steel Corp.*, 472 F.Supp. 1304, 1353-54 (E.D.Pa.1978) and 439 F.Supp. 55, 62-63, 83 (1977).

Moreover, the evidence in this case proves far more than mere passivity on the part of the unions. The distinction to be observed is between a union which, through lethargy or inefficiency simply fails to perceive problems or is inattentive to their possible solution (in which case, at least arguably, the union's inaction has no connection with race) and a union which, aware of racial discrimination against some of its members, fails to protect their interests. A union which intentionally avoids asserting discrimination claims, either so as not to antagonize the employer and thus improve its chances of success on other issues, or in deference to the perceived desires of its white membership, is liable under both Title II and § 1981, regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities.

XI. INDIVIDUAL CLAIMS

A. *Charles Goodman*

179. When hired by Lukens in 1965, named plaintiff Charles Goodman had had 11 years experience as an

acetylene burner, and requested assignment to a burner job. He was assigned instead to a laborer's job in the poll. He claims, further, to have been arbitrarily and discriminatorily denied a transfer to an all-white subdivision (Central Stores) in 1966, and to have experienced discriminatory disciplinary treatment in the early years.

Most of these allegations involve pre-limitations events. Moreover, the record leaves open the possibility that no position as burner was open when Goodman was first employed, and that there may have been no openings in Central Stores when he sought transfer. The pre-limitations disciplinary incidents are not actionable here, and the evidence concerning them is sufficiently cloudy to preclude their consideration as background for post-discrimination matters.

180. Mr. Goodman suffered a heart attack, apparently some time in late 1969. In January 1970, he was permitted to transfer temporarily to the Plant Protection Department, as a security guard. It was standard practice for Lukens to permit employees who, by reason of physical disability, had difficulty performing the more strenuous work of the operating departments, to work as security guards in the Plant Protection Department. Most of the employees, and all of the supervisory personnel, in the Plant Protection Department were white.

Unfortunately, it was rather common for security guards to be caught napping while on duty. The evidence as a whole leaves little doubt that such infractions by white guards were almost always overlooked, whereas such infractions on the part of black guards were likely to result in the imposition of discipline. During his tenure as a temporary guard, Mr. Goodman was twice warned about sleeping on the job, whereas more flagrant violations by white guards went unpunished.

Moreover, the two warnings Mr. Goodman received occurred in January and February 1971, some four months after he had been denied a permanent assignment to the Plant Security Department. In August and

October 1970, Mr. Goodman was denied permanent assignment in that department, whereas four white employees, two of whom had less seniority than Goodman, were granted permanent assignments. Accordingly, Lukens' purported reliance upon the alleged sleeping incidents as a reason for turning down Goodman's promotion cannot be accepted.

I find that Charles Goodman was discriminated against on racial grounds in being denied a permanent assignment to the Plant Security Department.

181. Mr. Goodman also complains that his eventual discharge from employment at Lukens was discriminatory. His active employment at Lukens ceased in 1975, because of medical disability. He was finally terminated in 1978, because he failed to respond to a notice sent to him by the company. Mr. Goodman claims that he did not receive the notice, and this may be true; but it is clear that Lukens did send the notice to the address which Goodman had provided. In these circumstances, it is clear that Mr. Goodman has failed to establish that racial considerations entered into the discharge decision.

B. *Lymas Winfield*

182. In 1965, Lymas Winfield, at the suggestion of his black foreman, took a reading comprehension test, to become eligible for training for the position of foreman. He was told by his white general foreman, George Wasko, that he had passed the test, and that he could become a permanent foreman after going to foreman school. However, Winfield was not admitted to the school.

183. In 1967, Winfield took a second test, similar to the first, and was again told that he had passed. He still was not placed in the school.

184. From 1965 through 1970, Winfield often worked as a temporary foreman, sometimes for as long as 27 weeks at a stretch. In August 1970, he asked Wasko

whether he could become a permanent foreman, and was told that he would have to take another test because the test had been changed. Winfield checked at the Employment Office and learned that the foreman test had not been changed. When Wasko was confronted with this information, he told Winfield that he wanted to have a more recent score. Winfield therefore took the test for a third time. Winfield repeatedly asked Wasko about the results of the test, but for several months Wasko continued to state that he had not yet received the results. Eventually, Wasko told Winfield that he had passed the test and that Winfield would be sent to the first available foreman school. More than three years elasped, however, before Winfield was sent to the foreman training school.

In the interim, Winfield encountered overt racial discrimination from a white salaried employee named Ted Corbo, whose job it was to tell Winfield what work was to be done by Winfield's crew. *Inter alia*, Corbo at one time stated that he was accustomed to dealing with "a different type of people than Winfield"; in context, this had racial connotations.

In early 1973, Winfield overheard Mr. Wasko tell another Lukens employee that Winfield was the best foreman he had. Shortly afterward, Winfield again asked Wasko about being promoted to a permanent foreman position. Wasko stated that this would require the approval of the superintendent, Horace Potter, and that he would inquire. A few days later, Wasko called Winfield into his office and stated that he, Winfield, was the lousiest foreman he had ever had, and that his request for promotion was being denied.

About a week later, a white employee, Lou Anderson, was transferred into Winfield's gang for the express purpose of learning the job of turn foreman being performed by Winfield (Winfield had previously been informed that an employee was not permitted to transfer from one gang to another).

As a result of Winfield's discussion of his situation with a black official of the union, John Robinson, the matter was referred to the company-union Civil Rights Committee. A series of meetings followed, or were scheduled and not held, or were scheduled without Winfield's knowledge. These culminated in a "showdown" meeting with Mr. Ryan, Lukens' manager of labor relations. In the course of that meeting, Wasko stated, falsely, that Winfield had failed the foreman's test three times. Winfield suggested that someone immediatley check with the Employment Office to verify the test results; although the Employment Office was open at the time, no check was made.

The outcome of the meeting was a decision that each of Winfield's supervisors would work closely with him for a week to learn what the job entailed and how he was performing. Compliance with this agreement was, however, spotty at best, and to some extent sabotaged by Mr. Wasko.

A few months later, Winfield became a named plaintiff in this lawsuit. Three months later, on September 18, 1983, Lukens official James Hall sent a "personal and confidential" memorandum to Norris Domangue, suggesting that Winfield should in fact be made a foreman "upon his graduation from the foremanship course. This is only a preliminary thought, however, which must be borne out by further investigation and, of course, discussion with our attorney."

In October 1973, Winfield was sent to foreman school, but continued to work as a temporary foreman.

Various other persons some white and some black, became permanent foreman thereafter, but Winfield did not. In 1974, Winfield despaired of ever becoming a foreman, and refused to continue further as a temporary, choosing instead to return to a job in the labor gang. He began to drink to excess, and experienced various physical and psychological problems.

In December 1974, Winfield telephoned the Philadelphia EEOC office to explain the problems he had been having in his attempts to become a foreman, and was invited to come in for an interview. The very next morning, however, Lukens' newly appointed equal employment counselor approached Winfield, and asked if he had been in contact with the EEOC (although she did not state what occasioned the inquiry). She requested that he delay further contact with the EEOC for two weeks, so that she could attempt to adjust the matter in the interim. She stated that she believed Winfield would be offered the job of permanent foreman and, in fact, in January 1975, after 10 years as a temporary foreman, Winfield finally became a permanent foreman.

185. In a 1973 memorandum, Lukens employment supervisor James Hall, having investigated Winfield's complaints, expressed the conclusion that Winfield's superiors had displayed poor judgment and that "It . . . appeared there was a double standard of a sort." (P-1080.)

186. I find from the evidence as a whole that Lymas Winfield's promotion to the position of permanent foreman was delayed for at least eight years on racial grounds and, after the filing of this lawsuit, also in retaliation for his participation in this litigation.

C. *Romulus Jones*

187. Named plaintiff Romulus Jones was hired by Lukens in June 1969 as an accounting trainee in the Accounting Department of the comptroller's organization, having just graduated from Penn State University with a degree in accounting. He was then one of two blacks out of approximately 45 employees in Lukens' main office building (the other black was a janitor). Ten years later, in November 1979, Jones and the janitor were still the only black employees in the building.

188. During this 10-year period, Jones was repeatedly passed over for promotion. At least seven white employees, many of them less senior, and none shown to be better qualified than Jones, received promotions.

The evidence undoubtedly establishes a *prima facie* case of racial discrimination in denial of promotions. Lukens has attempted to rebut plaintiffs' case by presenting evidence to the effect that Jones' job performance was only marginal. Indeed, the company suggests that, had he not been black, Jones would have been dismissed. The job-evaluations underlying this testimony were, however, all prepared after Jones complained to the EEOC. On balance, I reject these explanations as post-hoc rationalizations.

I find that Romulus Jones was discriminated against on racial grounds by being denied promotions.

D. *Dock L. Meeks*

189. Many of Mr. Meeks' complaints relate to the pre-limitations period. Except to the extent that relief is herein afforded to the plaintiff class, Meeks' complaints about discrimination in work-assignments, incentive pay, scheduling, etc., do not persuade me that he is entitled to individualized relief in this case.

E. *John R. Hicks, III*

190. I have concluded that the named plaintiff John R. Hicks, III has not established a *prima facie* case of racial discrimination. His allegedly discriminatory treatment in the matter of discipline simply cannot stand, in the face of his deplorable record of absenteeism (approaching or exceeding 50%). If anything, the evidence tends to suggest discrimination against persons suffering from obesity, rather than racial discrimination.

F. *Ramon L. Middleton*

191. As noted above, I conclude that Ramon Middleton was discriminated against in being delayed entry to the Strand-Cast Unit, but I reject his claims relating to the "No. 1 operator" job.

G. *David Dantzler, Jr.*

192. At an earlier stage in this case, on October 9, 1979, I found that Mr. Dantzler had been discriminated against in disciplinary matters, and granted relief, including reinstatement with back pay. I remain persuaded that that disposition was correct, and conclude that no further individual remedy is due Mr. Dantzler in this case.

XII. CONCLUSIONS

1. The defendant Lukens Steel Company has discriminated against the plaintiff class, in violation of Title VII, during the limitations period applicable to this case, in the following respects:

a. Initial job assignments, including assignments to the pool as distinguished from seniority units, and to craft jobs as distinguished from non-craft jobs.

b. In promotions and/or transfers to better-paying craft jobs.

c. In denying incentive pay to employees in the Pits Subdivision.

d. With respect to discharges of employees during their probationary period.

e. With respect to promotions to salaried positions.

f. In its toleration of racial harassment.

2. In the same respects, defendant Lukens Steel Company has discriminated against the plaintiff class on racial grounds in violation of §1981.

3. The defendant unions have discriminated against the plaintiff class on racial grounds, in violation of Title VII and § 1981, in the following respects:

a. Failure to challenge discriminatory discharges of probationary employees.

b. Failure and refusal to assert racial discrimination as a ground for grievances.

c. Toleration and tacit encouragement of racial harassment.

4. The named plaintiff Charles Goodman is entitled to relief against the defendant Lukens Steel Company for discriminatory denial of a permanent position in the Plant Protection Department.

5. Named plaintiff Lymas Winfield is entitled to relief against the defendant Lukens Steel Company for improperly denying him promotion to the position of permanent foreman.

6. Named plaintiff Romulus Jones is entitled to relief against the defendant Lukens Steel Company for discriminatory denial of promotions.

7. Named plaintiff Ramon Middleton is entitled to relief against the defendant Lukens Steel Company for discriminatory delay in his transfer to the Strand-Cast Unit.

8. In all other respects, the claims of the above-named plaintiffs, and of the other named plaintiffs, are dismissed, as to their claims for individual relief.

ORDER

AND NOW, this 13th day of February, 1984, it is ORDERED:

1. That judgment is entered in favor of the plaintiff class and against all defendants, on the issues of liability specified in the accompanying Opinion.

2. Judgment is entered in favor of the named plaintiffs Charles Goodman, Lyman Winfield, Romulus Jones, Ramon Middleton and David Dantzler, Jr. and against the defendant Lukens Steel Company only, on liability, as to the issues specified in the accompanying Opinion.

3. In all other respects, the individual claims of the named plaintiffs are DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES GOODMAN, et. al.	:	CIVIL ACTION
v.	:	
LUKENS STEEL COMPANY, et al.	:	NO. 73-1328

MEMORANDUM AND ORDER

FULLAM, J. AUGUST 2, 1984

By Opinion and Order entered February 13, 1984, the liability issues in this lawsuit have been determined, largely — but not entirely — favorably to plaintiffs' cause. Since that time the parties, and the court, have been engaged in attempts to chart the future course of this litigation. Basically, the defendants would prefer an immediate appeal of the liability determinations, and a stay of all further proceedings pending the outcome of the appeal. Not surprisingly, plaintiffs object to the prospect of this additional delay. There is undoubted merit in both positions.

The record is complete as to matters affecting class-wide injunctive relief, there is no reason to delay formulation of an injunctive decree, and an appeal from the grant of injunctive relief would permit appellate review of at least most of the basic liability determinations already made. Accordingly, an appropriate decree will be entered, and the parties may pursue their appellate rights as they see fit.

The real issue is whether, and to what extent, the litigation should proceed pending appeal. In my view, given the inordinate delays which have already plagued this litigation, it would be most unreasonable to stay all further proceedings until the liability appeals are determined. Appropriate notice to the class members should not involve inordinate expense or difficulty, and many of

the resulting individual claims would probably not require extensive additional discovery. At any rate, the process of further discovery can be closely monitored, so as to preclude the imposition of inordinate expense which might later prove to have been unnecessary.

It should also be mentioned that the parties apparently recognize the desirability of an amicable resolution of the entire controversy. Since the trial will be non-jury, I deem it inappropriate to participate in settlement discussions or proceedings. However, the parties will be encouraged to seek judicial assistance from one or more other members of this court to that end, if they desire.

In conformity with the foregoing views, I now enter three Orders: an injunctive order directed to the defendant Lukens Steel Company, an injunctive decree directed to the defendant unions, and an order with regard to further proceedings in the interim

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES GOODMAN, et. al.	:	CIVIL ACTION
v.	:	
LUKENS STEEL COMPANY, et al.	:	NO. 73-1328

ORDER

AND NOW, this 2nd day of August, 1984, the court having considered the evidence presented at trial in this matter and the submissions of the parties, and in light of the liability determinations in this Court's Order and Opinion dated February 13, 1984, and for good cause appearing, it is ORDERED that:

1. Defendant Lukens Steel Company, Lukens Steel Company Division at its Coatesville plant ("Lukens"), is enjoined from discriminating against its black employees with respect to initial job assignments. In addition, Lukens is hereby ordered to do the following:

(a) maintain, in chronological order, the applications for employment of all those seeking jobs in the hourly workforce. Nothing herein shall obligate Lukens to keep applications on file for more than two years;

(b) as openings arise for entry-level positions except for those positions which require special skill or training, contact applicants in the order in which they applied for employment, *i.e.*, a good-faith attempt should be make to first contact those individuals whose applications have been on file the longest;

(c) each individual contacted as set forth above shall be offered, in the order of their application, his/her choice of all available openings; and

(d) each quarter prepare a report setting forth, by race, the placement, both with respect to pool and non-pool positions and with respect to initial job grade for all non-pool positions, of all those hired during the preceding quarter. This report shall be available to counsel upon request.

2. Lukens is enjoined from discriminating against black employees with respect to promotion to craft jobs, and is specifically enjoined from relying upon any test not validated as job-related, in making hiring or promotional decisions. In addition, Lukens is ordered to do the following:

(a) designate one day a week as test day to permit any employee who has failed any test(s) for entry into the craft apprenticeship program to retake that test on test day. An employee shall be free to re-take the test(s) once a week for as many weeks as that employee desires. All employees who failed the test(s) shall be notified of their right to re-take the test and notified of any and all existing company tutoring programs;

(b) evaluate at least once a year the nature of craft jobs and the skills necessary to perform those jobs to assure that the content of any test(s) used for entry into the craft apprenticeship program are job-related; and

(c) each quarter prepare a report setting forth, by race, all those who have taken any test for entry into the craft apprenticeship program and all those individuals who have passed that

test(s) during the preceding quarter. This report shall be available to counsel upon request.

3. Lukens is enjoined from discriminating against black employees with respect to incentive pay to employees in the pits subdivision. In addition, Lukens is ordered to do the following:

(a) maintain a file of all incentive pay agreements and work preservation agreements currently in effect or, in the future, put into effect;

(b) make this file available to plaintiffs' counsel upon request; and

(c) notify plaintiffs' counsel of any changes in any incentive pay or work preservation agreement(s).

4. Lukens is enjoined from discriminating against black employees with respect to the discharge of employees during their probationary period. In addition, Lukens is ordered to do the following:

(a) promulgate written standards for the termination of probationary employees;

(b) require a written explanation of any recommendation to terminate a probationary employee;

(c) maintain a file of such recommendations and the action taken pursuant thereto; and

(d) each quarter prepare a report setting forth, by race, all employees terminated during their probationary period during the preceding quarter. This report shall be available to counsel upon request.

5. Lukens is enjoined from discriminating against black employees with respect to promotion to

salaried positions. In addition, Lukens is ordered to do the following:

(a) post in at least one location easily accessible to the hourly workforce all entry level salaried positions. This posting shall include, at a minimum, the following information: (i) a general description of the duties of the position; (ii) a general description of the skill and experience requirements, if any, and (iii) where and how to apply for the posted position; and

(b) each quarter prepare a report setting forth, by race, all employees promoted from the hourly to the salaried workforce during the preceding quarter. This report shall be available to counsel upon request.

6. Lukens is enjoined from discriminating against blacks by toleration of racial harassment. In addition, Lukens is ordered to do the following:

(a) promulgate written rules to prevent such conduct by its employees which shall specify the prohibited conduct and the applicable penalties for such conduct; and

(b) each quarter prepare a report listing all complaints of racial harassment made by employees and the action taken with respect to those complaints, including all penalties assessed. This report shall be available to counsel upon request.

7. This Order shall remain in full force and effect for five years unless earlier modified or dissolved.

Fullam, *U.S.D.J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES GOODMAN, et al.	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	
LUKENS STEEL COMPANY, et al.	:	
Defendants.	:	NO. 73-1328

ORDER

Based upon the liability determinations contained in this Court's opinion and order of February 13, 1984, and after consideration of the submissions of the parties with respect to the appropriate injunction to issue with respect to the violations found in that opinion, IT IS HEREBY ORDERED, this 2nd day of August, 1984, that:

1. Defendant United Steelworkers of America and defendants Local 1165 and Local 2295 of the Steelworkers (collectively referred to as "the defendant unions") are enjoined from discriminating against black employees of Lukens Steel Company ("Lukens") by failing to challenge discriminatory discharges of probationary employees. To effectuate this injunction, it is further ordered that:

(a) The defendant unions shall prepare a written notice informing probationary employees of the fact that the collective bargaining agreement between Lukens and the Unions prohibits Lukens from discharging probationary employees based upon their race or color, and advising any probationary employee who is discharged and who believes his discharge to be racially discriminatory to contact the chairman of

the grievance committee for the local having jurisdiction over that probationary employee's job. The defendant unions shall furnish copies of this notice to defendant Lukens which shall, in turn, give a copy of the notice to each new bargaining-unit employee who is hired by Lukens.

(b) The defendant unions shall prepare written guidelines for the handling of complaints of racial discrimination by a discharged probationary employee. These guidelines shall include at least the following provisions:

(i) To insure centralized control and record-keeping, all complaints of racial discrimination by a discharged probationary employee shall be referred to the chairman of the grievance committee.

(ii) Upon receiving a complaint of discrimination by a discharged probationary employee, the grievance committee chairman shall create a written record indicating the name of the complainant, the date of the complaint, and the basis offered for the complaint. A copy of this document shall be furnished to the union co-chairman of the Company-Union Civil Rights Committee and to the International Staff Representative assigned to service the Local.

(iii) The grievance committee chairman shall make a written notation in the record he is maintaining of the disposition of the complaint. The complainant shall have the right to receive a copy of the chairman's record and to review the

chairman's decision with the International Staff Representative assigned to service the Local.

(c) A copy of the guidelines required to be created by subparagraph (b) shall be given to each grievance committeeman, assistant grievance committeeman, and shop steward, and shall be posted at the local union hall. In addition, the defendant unions shall provide a training session for all grievance committeemen, assistant grievance committeemen, and shop stewards concerning the handling of complaints of racial discrimination by discharged probationary employees.

(d) Counsel for plaintiffs shall be entitled, upon request (but not more often than quarterly), to receive a copy of any record maintained by the chairman of the grievance committee pursuant to this paragraph.

2. The defendant unions are enjoined from discriminating against black employees of Lukens by failing or refusing to assert meritorious claims of racial discrimination as a ground for grievances or other complaints. To effectuate this injunction it is further ordered that:

(a) The defendant unions shall prepare written guidelines for the handling of complaints of racial discrimination. These guidelines shall include at least the following provisions:

(i) To insure centralized control and record-keeping, all complaints of racial discrimination shall be referred to the chairman of the grievance committee.

(ii) Upon receiving a complaint of discrimination, the grievance committee

chairman shall create a written record indicating the name of the complainant, the date of the complaint, and the basis offered for the complaint. A copy of this document shall be furnished to the union co-chairman of the Company-Union Civil Rights Committee and to the International Staff Representative assigned to service the Local.

(iii) The grievance committee chairman shall make a written notation in the record he is maintaining of the disposition of the complaint. The complainant shall have the right to receive a copy of the chairman's record and to review the chairman's decision with the International Staff Representative assigned to service the Local.

(b) A copy of the guidelines required to be created by subparagraph (a) shall be given to each grievance committeeman, assistant grievance committeeman, and shop steward, and posted at the local union hall. In addition, the defendant unions shall provide a training session for all grievance committeemen, assistant grievance committeemen, and shop stewards concerning the handling of complaints of racial discrimination.

(c) Counsel for plaintiffs shall be entitled, upon request (but not more often than quarterly), to receive a copy of any record maintained by the chairman of the grievance committee pursuant to this paragraph.

3. The defendant unions are enjoined from discriminating against black employees of Lukens by

tolerating or giving tacit encouragement to racial harassment. To effectuate this injunction it is further ordered that:

(a) The defendant unions shall cause to be posted on bulletin boards throughout the plant and at the local union hall a statement that (i) racial harassment violates both state and federal law; (ii) the defendant unions are committed to oppose racial harassment; and (iii) any Lukens employee who feels that he or she has been subjected to racial harassment is encouraged to present the complaint to the union co-chairman of the company-union civil rights committee.

(b) The defendant unions shall prepare written guidelines for the handling of complaints of racial harassment. These guidelines shall include at least the following provisions:

(i) To insure centralized control and record-keeping, all complaints of racial harassment shall be referred to the union co-chairman of the civil rights committee.

(ii) Upon receiving a complaint of racial harassment, the civil rights committee chairman shall create a written record indicating the name of the complainant, the date of the complaint, and the basis offered for the complaint. A copy of this document shall be furnished to the International Staff Representative assigned to service the Local.

(iii) The chairman of the civil rights committee shall make a written notation in the record he is maintaining of the disposition of the complaint. The complainant shall have the right to receive a copy of

the chairman's record and to review the chairman's decision with the International Staff Representative assigned to service the Local.

(c) A copy of the guidelines required to be created by subparagraph (b) shall be given to each grievance committeeman, assistant grievance committeeman, and shop steward, and posted at the local union hall. In addition, the defendant unions shall provide a training session for all grievance committeemen, assistant grievance committeemen, and shop stewards concerning the handling of complaints of racial harassement.

(d) Counsel for plaintiffs shall be entitled, upon request (but not more often than quarterly), to receive a copy of any record maintained by the chairman of the civil rights committee pursuant to this paragraph.

4. This injunction shall continue for five years from the date of its entry unless earlier modified or vacated.

John P. Fullam
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1478 & 84-1509

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., AND LYMAS L. WINFIELD, on their own behalf and on behalf of others similarly situated,

and

UNITED POLITICAL ACTION COMMITTEE, an unincorporated association, DOCK MEEKS, DAVID DANTZLER, JOHN HICKS, III, individually and on behalf of all others similarly situated

v.

LUKENS STEEL COMPANY, and INTERNATIONAL STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO)

United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295, Appellants in 84-1478

Lukens Steel Company, Appellant in 84-1509

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civ. No. 73-1328)

PRESENT: WEIS, GARTH, and STAPLETON,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel June 11, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered February 13, 1984, and August 7, 1984, be, and the same are hereby vacated insofar as the findings that Lukens discriminated in transfers to salary positions and tolerance of racial harassment and the cause remanded to the said District Court for further consideration of these matters in light of this Court's ruling on the appropriate statute of limitations for the §1981 claims.

It is further ordered and adjudged that the said District Court's findings in favor of the class with respect to initial assignments will be vacated and the cause remanded for reconsideration in light of this Court's ruling on class representation.

It is further ordered that on remand the limitations period pertaining to the Title VII claims against the unions shall be adjusted in accordance with the opinion of this Court.

It is further ordered and adjudged that the finding of discrimination in the denial of incentive pay for the pit crew is reversed and it is directed that on remand that judgment be entered for the defendant on that claim.

All of the above in accordance with the opinion of this Court.

ATTEST:

Sally Mrvos
Clerk

November 13, 1985

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1982:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1988:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of

this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

12. Pa. Stat. §31 (repealed):

All actions of trespass, quare clausum fregit, all actions of detinue, trover and replevin, for taking away goods and cattle, all actions upon account and upon the case (other than such accounts as concern the trade of merchandise between merchant and mercant, their factors or servants), all actions of debt grounded upon any lending or contract without specialty, all actions of debt, for arrearages of rent, except the proprietaries' quitrents, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the five and twentieth

day of April, which shall be in the year of our Lord one thousand seven hundred and thirteen, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue and replevin, for goods or cattle, and the said actions of trespass quare clausum fregit within three years after the said five and twentieth day of April next, or within six years next after the cause of such actions or suit, and not after. And the said actions of trespass, of assault, menace, battery, wounding, imprisonment, or any of them, within one year next after the said five and twentieth day of April next, or within two years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year next after the words spoken, and not after.

12 Pa. Stat. §34 (repealed):

Every suit hereafter brought to recover damages for injury wrongfully done to the person, in cases where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards; in cases where the injury does result in death the limitation of action shall remain as now established by law.